No. 84-465-CFH
Status: GRANTED

Docketed:
August 30, 1984

Title: Lee Roy Black, Director, Missouri Department of Corrections and Human Resources and Dick D. Moore, Chairman, Missouri Board of Probation and Parole, Petitioners
v.
Nicholas J. Romano

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Morris III, John M.

Counsel for respondent: Cherrick, Jordan B.

Entry	Date	Note	Proceedings and Orders
1	Aug 30 1984	G	Petition for writ of certiorari filed.
2	Sep 28 1984		Brief of respondent Nicholas J. Romano in opposition filed.
3	Sep 28 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Oct 24 1984		DISTRIBUTED. November 9, 1984
5	Oct 24 1984		REDISTRIBUTED. November 9, 1984
7	Nov 13 1984		REDISTRIBUTED. November 21, 1984
8	Nov 13 1984		REDISTRIBUTED. November 21, 1984
9	Nov 26 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Nov 26 1984		Petition GRANTED.
			**********
11	Nov 28 1984	G	Motion of respondent for appointment of counsel filed.
12	Dec 3 1984		DISTRIBUTED. December 7, 1984. (Above motion).
13	Dec 10 1984		Motion for appointment of counsel GRANTED and it is ordered that Jordan B. Cherrick, Esquire, of St. Louis, Missouri, is appointed to serve as counsel for the respondent in this case.
14	Jan 10 1985		Joint appendix filed.
15	Jan 10 1985		Brief of petitioner Black, Dir., MO DOC, et al. filed.
16	Jan 11 1985	G	Motion of the Attorney General of Missouri to permit David C. Mason, Esquire, of Jefferson City, Missouri, to argue pro hac vice filed.
17	Jan 14 1985		Record filed.
18	Jan 14 1985		Brief amicus curiae of Indiana, et al. filed.
19	Jan 21 1985		Motion of the Attorney General of Missouri to permit David C. Mason, Esquire, of Jefferson City, Missouri, to argue pro hac vice GRANTED. Justice Powell OUT.
20	Feb 5 1985		SET FOR ARGUMENT. Monday, March 18, 1985. (3rd case).
21	Feb 21 1985		CIRCULATED.
22	Feb 11 1985	X	Brief of respondent Nicholas J. Romano filed.
23	Mar 11 1985	X	Reply brief of petitioners Black, Dir., MO DOC, et al. filed.
24	Mar 18 1985		ARGUED.

84-465

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FILED
AUG 30 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DR. LEE ROY BLACK,
Director of the Missouri Department of Corrections and Human Resources,
DICK D. MOORE,
Chairman, Missouri Board of Probation and Parole,
Petitioners,

v.

NICHOLAS J. ROMANO,
Respondent.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit has rendered a decision in conflict with this Court's decision in Bearden v. Georgia, ____ U.S. ____, 103 S.Ct. 2064 (1983).

2. Whether the opinion by the United States Court of Appeals for the Eight Circuit is erroneous to the extent that it creates an important question of federal law which should be settled by this Court.

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Bearden v. Georgia, ___U.S. ___., 103 S.Ct. 2064 (1983);

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Borodine v. Douzanis, 592 F.2d 1202 (1st Cir. 1979);

Bruce v. Duckworth, 659 F.2d 776 (7th Cir. 1981), cert. denied, 455 U.S. 955, 102 S.Ct. 464, 71 L.Ed. 673 (1981);

Bumgarner v. Lockhart, 361 F. Supp. 829 (D.C. Ark. 1973);

Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975);

Cook v. Bordenkircher, 602 F.2d 117 (6th Cir. 1979), cert. denied, 444 U.S. 936, 108 S.Ct. 286, 62 L.Ed.2d 196 (1979);

Ford v. Wainwright, 439 F.2d 981 (5th Cir. 1977), cert. denied, 434 U.S. 926, 98 S.Ct. 407, 54 L.Ed.2d 284;

Fritchie v. McCarthy, 666 F.2d 208 (9th Cir. 1980);

Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973);

Green v. Nelson, 442 F.Supp. 1047 (D. C. Conn. 1977);

Iasigi v. Van de Carr, 166 U.S. 391 (1897);

McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982);

Maggio v. Fulford, 103 S.Ct. 2261

Morrisey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed2d 484 (1972);

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Redding v. Vermillion, 416 F.Supp. 1181 (D.C. Mo. 1976);

Romano v. Black, 567 F.Supp. 882 (D.C. Mo. 1983);

Romano v. Black, 735 F.2d 319 (8th Cir. 1984);

United States v. Bazzano, 712 F.2d 826 (3rd Cir. 1983);

United States v. Burkhalter, 588 F.2d 604 (8th Cir. 1978);

United States ex rel. Gentry v. Circuit Court of Cook County, Municipal Division, First Municipal District, 586 F.2d 1142 (7th Cir. 1978);

United States ex rel. Graham v. United States Parole Commission, 732 F.2d 849 (11th Cir. 1984);

United States v. Rifen, 634 F.2d 1142 (8th Cir. 1980);

United States ex rel. Rivers v. Faranzen,

522 F.Supp. 443 (D.C. Mo. 1981);

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ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Missouri, granting respondent's petition for a writ of habeas corpus is reported as Romano v. Black, 567 F.Supp.

882 E.D. Mo. 1983. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, affirming the decision of the District Court appears at 735 F.2d 319 (8th Cir. 1984).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit affirming the District Court decision granting respondent's petition for writ of habeas corpus under Title 28 U.S.C. § 2254, was filed on May 31, 1984. Pursuant to Title 28 U.S.C. § 2101(c), the present petition for a writ of certiorari was required to be filed within 90 days of the entry of this judgment, on or before August 31, 1984. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fourteenth Amendment to the United States Constitution provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. Title 28 U.S.C. § 2454 reads in pertinent part as follows:

> "A. The Supreme Court, a justice thereof, a Circuit Judge, or a District Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> B. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears

> that the applicant has exhausted the remedies available in the courts of the State or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

STATEMENT OF THE CASE

On November 15, 1976, Nicholas J. Romano entered guilty pleas to a two count indictment charging him with the transfer and the sale of a controlled substance. On April 13, 1977, the Honorable Dean Wipple, Judge of the Circuit Court of Laclede County, Missouri, sentenced Romano (herein referred to as Respondent) to two terms of 20 years to be served concurrently.

Execution of said sentences was suspended and Respondent was placed on probation for five years. On June 15, 1977, Respondent was involved in a traffic accident which led to his being charged with the felony of leaving the scene of an accident. On July 18, 1977, Respondent's probation was revoked and he was ordered incarcerated. The charge of leaving the scene of an accident was subsequently reduced and respondent was convicted of careless and imprudent driving on October 12, 1977.

On March 28, 1980, respondent filed a pro se motion for post conviction relief in the Circuit Court of Laclede County seeking to challenge the probation revocation proceeding. Said motion was overruled as the Court held that the proper remedy was to file a habeas corpus petition. Respondent thereafter filed a

petition for writ of habeas corpus in the Circuit Court of Cole, County, Missouri, however, said petition was dismissed by the Circuit Court of Cole County on an improper procedural ground. Respondent thereafter went back to the Circuit Court of Laclede County where his motion for reconsideration of his request for post conviction relief was dismissed. Respondent filed a Notice of Appeal with the Missouri Court of Appeals, Southern District, but said appeal was dismissed.

On April 14, 1980, Respondent filed a petition for writ of error coram nobis challenging the constitutionality of his careless and imprudent driving conviction. Said petition was dismissed and respondent's out of time appeal to the Missouri Court of Appeals, Eastern District, was subsequently dismissed for failure to prosecute.

On June 12, 1981, respondent filed a petition for writ of habeas corpus with the United States District Court, Eastern District of Missouri, again challenging his conviction for careless and imprudent driving. On October 2, 1981, the Honorable John F. Nangle denied respondent's habeas corpus petition and ordered that his case be dismissed. On appeal from this dismissal respondent for the first time in federal court raised the ground that his probation revocation was improper. This being some four years after he was incarcerated. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's dismissal and, as to the new ground, dismissed said claim without prejudice for failure to exhaust available state remedies.

On October 4, 1982, respondent filed a habeas corpus petition with the Missouri Supreme Court challenging his probation revocation. On October 18, 1982, the Missouri Supreme Court denied said petition without opinion. Thereafter, respondent filed the petition for writ of habeas corpus with the United States District Court for the Eastern District of Missouri which has led to this subsequent appeal.

During the taking of respondent's guilty plea, he was interrogated by the Court in connection with his past, the incident which led to the charges and the voluntary nature of his plea. Respondent's crime concerned his possession of 26 pounds of marijuana. It appears that respondent was attempting to trade this marijuana for opium or heroin. Respondent had harvested the marijuana,

refined it and packaged it into 26 one pound plastic bags. A pre-sentence investigation was ordered. On April 13, 1977, a hearing was held on respondent's sentencing. At the sentencing hearing respondent testified and there was also testimony by a man who identified himself as the respondent's employer. Respondent's counsel also introduced a psychological evaluation which was rendered by one Sheldon Silk and an affidavit by a man named Clark. Respondent's counsel then made a statement to the Court in support of the Court's granting the respondent probation. Respondent's counsel discussed the fact that the pre-sentence investigation report did not recommend probation and also discussed the statements in the pre-sentence investigation report as well as in the evaluation by Mr. Silk, that

the respondent had trouble reconciling himself with authority figures. Respondent's counsel urged that the respondent be placed on probation. Thereafter, the Trial Judge, the Honorable Dean Whipple, indicated that he had "labored with this case" for some time and that he had decided to place the petitioner on probation. This decision was contrary to the recommendation of the pre-sentence investigation report and the recommendation of the prosecutor. On June 14, 1977, only approximately two months after the respondent was placed on probation, the incident which led to his probation revocation occurred. A hearing was held on July 18, 1977, before Judge Whipple concerning this probation violation and the respondent's probation was revoked.

At respondent's probation revocation hearing he was represented not by one but by two attorneys. At the hearing Mr. Gerald Saunders testified that at approximately 2:00 a.m. on June 14, 1977, he was standing in front of the Stein Club in Columbia, Missouri, when he saw a Datsun speeding down Broadway, serve over the center line, make a U-turn and come back by the Stein Club, serving into the parking area. At the time the car struck one Timothy Bradley. Mr. Saunders saw the car then serve to stop and Miss Jody Seificas and Terry DeHaven got out of the car. The car then pulled across the street into a parking area and when Mr. Saunders looked again it was gone. Mr. Saunders then testified that in a later conversation Terry DeHaven informed him that the respondent was driving the automobile.

Police Officer Larry Wright testified that he arrived at the scene after he received a radio dispatch and began to interview witnesses. Upon questioning Jody Seificas, she indicated that she had been riding in the vehicle involved in the accident and that the driver was respondent. Police Officer Wright also testified that upon interviewing Mr. Saunders, he was informed that Mr. Saunders saw Miss Seificas get out of the driver's side of the car but that it appeared to Mr. Saunders that she got out of the back seat of the car. There was also testimony from the mother of the victim, the father of the victim, and the victim's sister, that on the next afternoon they were visiting Timothy Bradley in his hospital room when the respondent came to the room. Mrs. Bradley stated that the respondent told

her son "It's too bad you jumped in front of me." Timothy Bradley's sister, Colleen Hibler, testified that the respondent stated "Too bad you had to jump right in front of me like that, it was a nightmare." Mr. Bradley testified that the petitioner stated "Why did you jump out in front of me?" There was similar testimony that from the time of the accident until approximately an hour after the respondent's arrest there were no calls to the police station by anyone identifying themselves as James Romano reporting an accident and in fact no one claiming to be a driver or a passenger of a car called in to report the accident.

Miss Jody Seificas when first called to testify refused to reveal any information concerning the night of the incident claiming her Fifth Amendment rights. Upon being recalled, Miss

Seificas admitted that she told a police officer on the night of the accident that she had been a passenger in the car. Thereafter, respondent called one witness to testify that he was in the hospital room with the respondent and other witnesses and that he did not hear the statements attributed to the respondent, although statements could have been made which he did not hear. The case was then extensively argued by respondent's counsel. Following a short recess, the Court informed the respondent that he was going to revoke probation.

Following respondent's probation revocation he was incarcerated in the Missouri Department of Corrections and Human Resources until December 1982, when he was granted a parole.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The basis for the District Court's jurisdiction in this cause was Title 28 U.S.C. § 2254.

ARGUMENT

The essential issue in this petition is whether this Court should allow the courts under its supervision to release state prisoners to remedy a mere procedural defect in a probation revocation hearing. Specifically, this Court should advise its lower courts as to whether a state judge hearing a request to revoke probation must expressly consider alternatives to incarceration in all cases, regardless of the seriousness of the probation violation and whether the failure to do so is so serious a violation of due process as to justify release of a state prisoner, serving a valid sentence, without giving the state Court an opportunity to remedy the procedural defect. It is the position of petitioner that the decision of the Eighth Circuit Court of Appeals in

the present cause merits review by this Court because it is directly in conflict with this Court's decision in Bearden v. Georgia, ____ U.S. ____, 103 S.Ct. 2064 (1983), it is contrary to decisions of other circuits and will work grave injury to the interest of justice not only in the State of Missouri but in all states within the Eighth Judicial Circuit.

In Bearden v. Georgia, ____ U.S. ____, 103 S.Ct. 2064 (1983), this Court considered a case wherein a prisoner's probation had been revoked due to his failure to make restitution to his victim. Admittedly, the primary issue in Bearden was whether the mere failure to make the promised restitution was sufficient to justify a revocation of probation. However, the analysis of Justice Sandra O'Connor, writing for the majority, strongly suggests that the

approach and rational of the Eighth Circuit in the present case is in conflict with Bearden.

The Eighth Circuit and the District Court in the present case have clearly overstated the need to expressly consider alternatives to incarceration. In United States v. Bazzano, 712 F.2d 826 (3rd Cir. 1983), the Court stated:

> "Whatever justification exists for requiring a trial court to explain its reasons when initially imposing sentence, there is far less justification for requiring a court to give reasons when it merely reinstates its earlier sentence after finding that the defendant had violated his probation. True, it is not inevitable that Courts

> will reimpose the original sentence upon finding a probation violation and there maybe good arguments given case for not doing so, but **when a defendant has violated the terms of his probation - even toward the end of his probationary period - it indicates to the Court that it erred in its original determination that the defendant did not need to serve his prison sentence in order to be rehabilitated."**

Id. at 839.

With these words the Third Circuit could not have more clearly stated that a violation of parole can, in and of

itself, support a revocation of probation and a subsequent incarceration, without a need for the sentencing judge to expressly consider alternatives to incarceration. In any event, Bozzano stands for the proposition that an expressed consideration of alternatives to incarceration is not absolutely mandated in every case, but is a consideration the importance of which is diminished by the nature of the probation violation and the extent of the felons culpability.

This approach was utilized by this Court in Bearden as the proper approach to probation revocation cases. Justice O'Connor, in framing the primary legal issue facing this Court in Bearden stated: "Today we address whether a Court can revoke probation for failure to pay a fine and restitution when there is

no evidence that the petitioner was at fault in his failure to pay or that alternate means of punishment were inadequate", footnote seven at 2069 (emphasis added).

Clearly, from the outset, Justice O'Connor's saw the probationer's fault as being a material concern in deciding whether a trial court erred in failing to expressly consider alternatives to incarceration. In deciding that the sentencing judge in Bearden should have considered alternatives to incarceration, Justice O'Connor noted in another footnote: "In contrast to a condition like chronic drunken driving, however, the condition at issue here, indigency, is itself no threat to the safety or the welfare of society". Footnote 9 at 2070. In contrast to the violation in Bearden, the violation by Mr. Romano, hit and run

driving, is a clear threat to the safety and security of society. Thus, the state trial judge could have properly concluded that a convict who would run over a friend, and leave him injured, without stopping to help his victim himself, is not responsible enough for any sort of probation, especially when the convict offers no justification for his actions.

In Bearden, Justices Powell, Burger and Rehnquist joined in a concurring opinion by Justice White. As to the Court's requirement that a trial judge may imprison certain probationers only if alternative measures are deemed inadequate, Justice White stated: "There is no support, in our cases or in my view, the Constitution, for his novel requirement". (Emphasis added). The Eighth Circuit obviously would disagree with the Justices. In its opinion, the

Eighth Circuit cited Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) and Morrisey v. Brewer, 408 U.S. 471 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), arguing that these cases required a sentencing judge to expressly consider alternatives to incarceration before revoking probation and ordering incarceration. Reading these cases in a light most favorable to the Eighth Circuit, petitioner is unable to find how these cases can be used to support the Eighth Circuit's holding. Morrisey due process requirements for parole revocation, as noted in footnote 1 on page 322 of the Eight Circuit's Opinion, says absolutely nothing about the consideration of alternatives to incarceration as a necessary element of due process. In Gagnon this Court did no more than apply the requirements of

Morrisey to probation revocations and added that "These requirements in themselves serves as substantial protection against ill considered revocation." Clearly, Justice White was correct when he concluded that "There is no support in our cases . . . for this novel requirement." Bearden, supra.

Review on certiorari is also warranted in that the District Court below and the Eighth Circuit Court of Appeals unfairly assumed that the state sentencing judge committed error and ignored the fact that the record did not show that the state sentencing judge's decision was clearly erroneous. As noted by the Eight Circuit, "The revocation of probation for violation of a condition of probation is within the discretion of the sentencing judge. United States v. Rifen, 634 F.2d 1142, 1144 (8th Cir.

1980)." Romano at 321. The scope of review is narrower when federal courts review state proceedings for their validity under the United States Constitution. Fritchie v. McCarthy, 666 F.2d 208 (9th Cir. 1980); Borordine v. Douzanis, 592 F.2d 1202 (1st Cir. 1979). This is because federal courts do not have supervisory power over state courts. United States, ex rel Gentry v. Circuit Court of Cook County, Municipal Division, First Municipal District, 586 F.2d 1142 (7th Cir. 1978); Cook v. Bordenkircher, 602 F.2d 117 (6th Cir. 1979), cert denied, 444 U.S. 936, 100 S.Ct. 286, 62 L.Ed.2d 196. A federal court must not overrule a state court's decision merely because it finds that the decision is not supported by the record. Maggio v. Fulford, 103 S.Ct. 2261, 1093. Thus, federal courts are required to afford

state court findings a "presumption of correctness", Bruce v. Duckworth, 659 F.2d. 776 (7th Cir. 1981), cert denied, 455 U.S. 955, 102 S.Ct. 464, 71 L.Ed.2d 673.

This "presumption of correctness" was recognized by the 8th Circuit when reviewing a probation revocation by one of its own federal courts. In United States v. Burkhalter, 588 F.2d 604 (8th Cir. 1978), the Eighth Circuit considered the appeal of a felon whose probation was revoked when the felon failed to comply with a probation condition requiring him to take vocational training. Petitioner Burkhalter argued that the district court abused its discretion when it failed to consider alternatives to incarceration. The Eighth Circuit speculated that petitioner's behavior indicated his ability to accept responsibility and

added "the District Court presumably considered these facts in determining whether appellant's chances of becoming a useful citizen would be better served if he successfully completes a probationary program or if he is imprisoned." Id. at 607. The Court then found no abuse of discretion.

It is often said that "what's good for the goose is good for the gander". While this is certainly no legal maxim, it only makes constitutional sense that our United States Courts of Appeals and District Courts should not be allowed to hold state courts to a higher and stricter standard than that applied to federal district courts when it comes to revocation of probation. Yet the District Court in the present case did just that when it stated:

"Judge Whipple indicated to Romano that once it was determined that he had violated a condition of his probation, he would terminate Romano's probation and send him to jail. The Court recognized that admonitions are commonly used by sentencing judges to inject fear of resulting consequences and discourage probation violations. But, when such statements are coupled with a record totally devoid of evidence showing that the judge considered alternatives to incarceration, there prevails a strong inference that the Judge harbored a disposition

> to send Romano to jail for any probation violation, regardless of the nature of the violation and without regard to any other possible options."

Romano, 735 F.2d at 323 quoting the District Court in Romano, 567 F.Supp at 886. Obviously from a silent record the District Court made its own presumptions as to the judges intent and motivation and presumed that the judge harbored an unconstitutional disposition toward Romano. To compound the judicial impropriety the Eight Circuit quoted this passage with approval, even though the District Court clearly presumed the State Court committed error when the State Court was entitled instead to a presumption of correctness. Likewise, without having the opportunity to observe

the demeanor of Romano during his hearing or without requiring an evidentiary hearing to take the state judge's testimony, the Eighth Circuit presumed that Romano's actions were not an attempt to avoid responsibility. Id. at 323. Considering the seriousness of Romano's violation and the fact that it occurred so soon after he was granted probation, if any presumption was to be made, it should have been one presuming the state judge considered whatever arguments for alternatives to incarceration that were presented by Mr. Romano's two attorneys, or by Mr. Romano himself, and concluded that a person who would run over someone and not stop to help them, was simply too irresponsible to be continued on probation.

In light of the fact that no prior Supreme Court ruling requires that

alternatives to incarceration be expressly considered in all probation revocation hearings, and in light of the fact that it is unclear as to whether the state judge did in fact consider alternatives to incarceration, the remedy granted by the District Court and affirmed by the Eighth Circuit can only be viewed as drastic and punitive against the State of Missouri.

There can be no question but that the appropriate remedy for denial of due process protections in parole and probation revocation hearings is to grant a new hearing. Atkins v. Marshall, 533 F.Supp. 324 (D.C.Ohio 1982). In Ford v. Wainwright,, 439 F.2d 981, cert. denied. 434 U.S. 926, 98 S.Ct. 407, 54 L.Ed.2d 284 (5th Cir. 1977), the state had revoked a prisoner's parole without any kind of hearing. The district court

ordered the state to provide a hearing for the prisoner who had been reincarcerated. The prisoner appealed, alleging that he was entitled to release; thus, the only issue on appeal, was the question of the appropriate remedy for a denial of procedural due process in a parole revocation hearing. The court held that a rehearing is the only appropriate remedy unless it has been shown that there was an unconstitutional delay in holding the revocation hearing. Id. at 983. While Ford and Atkins deal with parole revocations, they are persuasively applicable in a case involving the revocation of probation. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

There is an obvious reason why ordering a rehearing is the only appropriate remedy: to give a state the

opportunity to conduct a proper hearing. Gagnon, supra; Wynn v. Page, 390 F.2d 545 (5th Cir. 1968); Redding v. Vermillion, 416 F.Supp. 1181 (D.C.Mo. 1976). Even the Eighth Circuit has previously held that a state's right to hold a revocation hearing should not be taken away in the absence of a showing of demonstrated prejudice severe enough to render the revocation hearing itself inadequate in terms of relief. Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975). Thus, in Gagnon, the Supreme Court held that the state should be ordered to hold a rehearing even though the prisoner had served three years after revocation and was paroled before his habeas corpus petition was decided, facts extremely similar to the present case. Assuming a due process violation, the proper decision in the present case, therefore,

should have been one remanding the case to the state court, with instructions to hold a hearing wherein alternatives to incarceration are considered, with a reasonable amount of time for compliance, and in so doing, the court would have avoided substituting its own discretion for that of the judge hearing the probation revocation. Billiteri v. United States Board of Parole, 541 F.2d 938 (2nd Cir. 1976). Neither the district court nor the Eight Circuit discussed any alternatives to incarceration that should have been made available to Romano. Therefore, it cannot be said that Romano has suffered at all unless a hearing determines that there were in fact alternatives to incarceration that should have been considered for Mr. Romano. Only when there has been a determination that Mr.

Romano should have been given an alternative to incarceration can it be alleged that Mr. Romano has been in any way prejudiced. Until such a hearing, any allegation of prejudice is patently speculative.

The district court in the present case, and the Eighth Circuit in its opinion, make much of the fact that Romano had already served five and one-half years of his twenty-year sentence and could serve more if he again violated his parole. However, the amount of time Romano spent in prison does not justify the district court's action, and an affirmance of it. As noted earlier, in Gagnon, a Supreme Court case, the prisoner had in fact served several years after his parole was improperly revoked. Moreover, in Bumgarner v. Lockhart, 361 F.Supp. 829 (D.C. Ark. 1973), a hearing

was ordered to determine if a prisoner was competent to stand trial, since such a hearing had not been held before the prisoner's trial, even though he had served two and one-half years jail time after conviction. In United States ex rel. Rivers v. Faranzen, 522 F.Supp. 443 (D.C.Mo. 1981), the prisoner had served eight and one-half years. While appellants could offer more examples, the clear import of Gaynon, Bumgarner, Rivers and a number of other cases that could be named, it that the mere fact that a prisoner has served some time in prison is not a sufficient reason to release a prisoner outright until the state has had an opportunity to correct any due process deficiency. Appellants Black and Moore suggest that it is the province of the state and the state alone to decide when a prisoner has served enough time, unless

a sentence is shown to be constitutionally excessive. Even if one were to accept that the amount of time Romano spent in prison should be considered, Romano was the one who waited over four years before seeking a state or federal habeas corpus challenging the probation revocation. The State of Missouri should not be made to suffer the prejudice of Romano's outright release when that release is based on a delay caused solely by Romano. McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982). Moreover, the state has a right to observe convicted felons on a conditional release basis before giving them total freedom, unless that felon's conviction was constitutionally defective. Since Romano was not subject to the temptations and opportunities that face law-abiding citizens in society while he was in

prison, the court below has effectively ordered the State of Missouri to release a felon when the state cannot assure its citizens that that felon has been sufficiently rehabilitated so as not to constitute a risk to society.

Clearly, "a release from confinement . . . is an extraordinary remedy that deserves further discussion." Green v. Nelson, 442 F.Supp. 1047 (D.C.Conn. 1977). While it is true that in Green the prisoner was released, this was because the United States Parole Commission had engaged in numerous acts violating the constitutional rights of prisoners and had ignored court rulings against the Board. The court in Green decided, after fully considering the ramifications of release, that firm measures were required to ensure that the Commission acted constitutionally. Id.

at 1060. The present case in no manner presents a situation where there is a need to release Romano in order to punish the State of Missouri for repeated violations. The district court and Court of Appeals below suggest that there is some prejudice to Romano if he is subjected to the possibility of reincarceration. The Eleventh Circuit Court of Appeals made an excellent response to this issue in United States ex rel Graham v. United States Parole Commission, 732 F.2d 849 (11th Cir. 1984). In Graham an inmate had sought a writ of habeas corpus challenging certain parole regulations. Before his request was decided, he was released on parole. He appealed the dismissal of his case as moot on the grounds that, should he violate his parole, he would be reincarcerated and again subject to the

"unconstitutional" parole regulations. The Court responded "We believe this potential controversy is too speculative for adjudication". Id. at 850 (emphasis added).

The Eighth Circuit cited Iasigi v. Van de Carr, 166 U.S. 391, an 1897 Supreme Court case, as one the state should see to support the Court's ruling that Romano's release was not an abuse of discretion. Iasigi does not even marginally support the drastic actions taken by the district court in the present case. Joseph Iasigi was arrested in the City of New York on charges of embezzlement arising in the State of Massachusetts. Iasigi filed a habeas corpus petition alleging that he could not be sent to Massachusetts because, at that time, he was the duly recognized Counsel General of the Sultan of Turkey.

The district court denied the writ and remanded Iasigi to state custody. On appeal, the Supreme Court found that at the time Iasigi was remanded to state custody, he was no longer the Turkish Sultan's Counsel General, and thus the remand was affirmed. Clearly, not only does Iasigi not support a ruling that Missouri should be denied a chance to hold a new revocation hearing for Romano, but it is so totally unrelated to the issues before this Court, that its citation suggests plain error, requiring a reversal. The only portion of the entire opinion even marginally related to the present case is a portion quoting Justice Gray in Nishimura Ekiu v. United States, 142 U.S. 651, where the judge said:

> "A writ of habeas corpus is not like an action to recover

> damages for unlawful arrest or commitment, but its object is to ascertain whether the prison can legally be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

Iasigi, supra at 393. This quotation supports petitioners Black and Moore's contention that a mere defect in a revocation hearing, committing Romano to prison, does not justify his discharge from custody by a federal court. Therefore, an error has occurred in that the Eighth Circuit did not properly consider the issue of whether, under these facts, the district court abused

its discretion in completely releasing a convicted felon validly sentenced to twenty-years in prison without first giving the State of Missouri an opportunity to provide Romano with a hearing in accordance with the court's ruling. The law on this issue was clearly overlooked and misapplied, justifying a reversal.

In light of the extreme nature of the remedy granted, certiorari should also be granted in that the Eighth Circuit overlooked Appellants Black and Moore's arguments, and supporting cases, that the district court abused its discretion in denying these petitioners an evidentiary hearing to ascertain whether the state judge who revoked Romano's probation actually considered alternatives to incarceration. Judge Whipple could easily have concluded that

a convict who would run over a friend and leave him injured, without stopping to help his victim himself, is not responsible enough for any sort of probation, especially when that convict offers no justification for his actions. Before releasing a convict outright, the federal courts, out of respect to the states, should, in the very least, assure themselves that a deliberate denial of due process occurred, and not give such a drastic remedy based on a speculative finding of fact. Thus, a writ of certiorari should also be granted because the Eighth Circuit overlooked the issue of whether the district court should have held an evidentiary hearing to determine if the state judge had considered alternatives to incarcerating Romano before sending him to prison.

CONCLUSION

Petitioner's have shown that Supreme Court review is necessary in this case in that the decision of the Eight Circuit Court of Appeals is substantially in conflict with a prior decision of this Court and guidance must be given to the Eighth Judicial Circuit as well as all federal courts as to what the extent of due process must be in state probation revocation proceedings, and what remedy or remedies are most appropriate in such cases. Petitioner has established that a consideration of alternatives to revocation are not mandatory when a probationer knowingly and wilfully commits a serious violation of probation conditions. Moreover, absent extremely prejudicial circumstances caused by the clear misconduct of a state court or other state officials, the drastic remedy

of total release is not warranted and a state should only be ordered to grant a new revocation hearing. Petitioner calls upon this court to review this important case by granting this petition for a writ of certiorari.

Respectfully submitted,

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84-465

Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DR. LEE ROY BLACK,
Director of the Missouri Department of Corrections and Human Resources,
DICK D. MOORE,
Chairman, Missouri Board of Probation and Parole,
Petitioners,

v.

NICHOLAS J. ROMANO,
Respondent.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX

35pp

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 83-2000

NICHOLAS JAMES ROMANO, *
*
Appellee, *
*
v. *
*
DR. LEE ROY BLACK AND *
DICK D. MOORE, *
*
Appellants. *

Appeal from the United States District Court for the Eastern District of Missouri

No. 83-2001

NICHOLAS JAMES ROMANO, *
*
Appellant, *
*
v. *
*
DR. LEE ROY BLACK AND *
DICK D. MOORE, *
*
Appellees. *

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: January 12, 1984
Filed: May 31, 1984

Reported at: 735 F.2d 319 (8th Cir. 1984)

Before ROSS, JOHN R. GIBSON, AND BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge

Appellants Dr. Lee Roy Black and Dick D. Moore of the Missouri Department of Probation and Parole appeal from the District Court's order granting Nicholas J. Romano's petition for a writ of habeas corpus. The District Court held that the sentencing judge denied Romano due process in failing to consider alternatives to incarceration before revoking Romano's probation. Romano v. Wyrick, 567 F.Supp. 882 (E.D.MO. 1983). We affirm the District Court's order. Romano cross-appeals, challenging the District Court's finding that one of the witnesses at the probation revocation hearing validly waived her privilege against self-incrimination. We need not discuss this contention, however, since our affirmance

of the District Court's order grants Romano all the relief he seeks.

I. Facts and Procedural History

On December 10, 1974, Romano was arrested for transferring and selling marijuana. A two-count indictment charging him with transferring and selling marijuana was issued. On November 15, 1976, Romano pled guilty to both counts before the Honorable Dean Whipple, Circuit Judge of the Twenty-Sixth Judicial Circuit of Missouri, sitting in Laclede County. On April 13, 1977, Romano was given a suspended sentence of two concurrent twenty-year prison terms and placed on probation for five years.

On June 15, 1977, Romano was involved in an automobile accident. He was arrested and charged with leaving the scene of an accident--a felony in the State of Missouri. At a probation

revocation hearing held on July 18, 1977, Judge Whipple revoked Romano's probation and imposed the two concurrent twenty-year suspended sentences. Romano began serving those sentenced immediately. The charge of leaving the scene of an accident was reduced later to careless and reckless driving, a misdemeanor, and Romano pled not guilty to that charge. On October 12, 1977, Romano was found guilty of careless and reckless driving and was fined one hundred dollars and costs.

On March 28, 1980, Romano filed with Judge Whipple a pro se motion for post-conviction relief under Mo. R. CRIM. P. 27.26 (Rule 27.26). In this motion Romano challenged the probation revocation proceeding. Judge Whipple denied this motion on July 11, 1980, holding that although a Rule 27.26 motion is the proper avenue for post-conviction relief in

Missouri, an exception to that rule is made when the challenged proceeding is one for probation revocation, in which case relief must be sought by way of a habeas corpus petition.

On the basis of Judge Whipple's ruling, Romano filed a petition for a writ of habeas corpus challenging his probation revocation. The petition was filed in the Circuit Court of Cole County, the county in which Romano was incarcerated. That court denied this petition and instructed Romano to file a Rule 27.26 motion in the county where he was convicted and sentenced. Acting on that instruction, Romano then petitioned the Laclede County Circuit Court for reconsideration of his motion for post-conviction relief. On August 27, 1980, Judge Whipple denied Romano any relief, restating the reasons given when he originally denied Romano's

27.26 motion. Romano then filed a notice of appeal with the Missouri Court of Appeals. The appeal was dismissed without opinion on February 3, 1981. On April 14, 1980, Romano filed a petition for writ of error coram nobis challenging the constitutionality of his reckless driving conviction. The petition was denied, and Romano filed a notice of appeal with the Missouri Court of Appeals. This appeal was dismissed on November 18, 1980 for failure to prosecute.

On June 13, 1981, Romano filed a petition for a writ of habeas corpus with the United States District Court for the Eastern District of Missouri under 28 U.S.C. § 2254. In this petition he once again challenged the constitutionality of his reckless driving conviction. The petition was denied on October 2, 1981. The District Court reasoned that it was

powerless to affect Romano's incarceration since his petition challenged only the constitutionality of his probation revocation proceeding. A subsequent appeal by Romano had failed to exhaust state remedies. Romano v. Wyrick, 681 F.2d 555, 556-57 (8th Cir. 1982). On October 4, 1982, Romano filed a petition for a writ of habeas corpus with the Missouri Supreme Court challenging his probation revocation proceeding. The petition was denied without opinion on October 18, 1982.

Having exhausted his state remedies, on November 4, 1982 Romano again filed a petition for a writ of habeas corpus with the District Court under 28 U.S.C. § 2254, this time challenging the probation revocation proceeding. While the petition was pending, Romano was released on parole on December 17, 1982. The

District Court granted Romano a writ of habeas corpus on June 20, 1983, and ordered him released unconditionally from the custody of the Missouri Department of Probation and Parole. 567 F.Supp. at 887. The present appeals are from the judgment of the District Court.

II. Discussion

A. Adequacy of the Probation Revocation Hearing

The District Court held that Romano was denied due process when, during the probation revocation hearing, Judge Whipple failed to consider alternatives to imposition of the prison terms to which he previously had sentenced Romano. We affirm.

The revocation of probation for violation of a condition of probation is within the discretion of the sentencing judge. United States v. Rifen, 634 F.2d

1142, 1144 (8th Cir. 1980). If the sentencing judge determines that the probationer has "abused the opportunity granted him not to be incarcerated," the judge may revoke the probation. Schneider v. Housewright, 668 F.2d 366, 368 (8th Cir. 1981) (quoting United States v. Nagelberg, 413 F.2d 708, 709 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970)). In making this determination the government must present enough evidence "'to satisfy the [sentencing] judge that the conduct of the probationer has not met the conditions of the probation'" (United States v. Strada, 503 F.2d 1081, 1085 (8th Cir. 1974) (quoting United States v. Garza, 484 F.2d 88, 89 (5th Cir. 1973)); Ewing v. Wyrick, 535 S.W.2d 442, 444 (Mo. 1976). This is a far less stringent test than the reasonable doubt standard used in criminal trials.

In the instant case, it has been established by sufficient evidence that Romano violated the terms and conditions of his probation. The sentencing judge's analysis, however, should not end with the mere finding of a probation violation. The Supreme Court requires that a sentencing judge state the reasons for revoking probation in order to satisfy the due process requirements of the Fifth and Fourteenth Amendments. Gagnon v. Scarpelli, 411 U.S. 778, 784 (1973) (citing Morrissey v. Brewer, 408 U.S. 471, 479-80 (1972)). The revocation decision must include both a finding that the probationer violated a condition of his parole and that the probationer should be committed to prison. The Court considered such an analysis vital to preserving the function of the probation and parole systems. As the Court noted:

> Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion--the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

Id. at 785. Gagnon and Morrissey thus establish that "informed use of discretion" in a revocation proceeding must include consideration of alternatives to incarceration.[1]

---

[1]The following requirements for a parole revocation hearing were established in

Appellants Black and Moore note correctly that the sentencing judge in the present case made no statements as blatant as those made by the sentencing judge in Abel. We believe, however, that the Abel court did not intend any rigid formula for determining what constitutes

---

Morrissey:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses *unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole.

Morrissey, 408 U.S. at 489. Gagnon applied these requirements to probation revocation hearings. Gagnon, 411 U.S. at 782.

adequate consideration of alternatives to incarceration, but instead anticipated case-by-case analyses. Similarly, we must consider carefully the record here in order to determine if it shows compliance with the Constitutional standards established by Gagnon and Morrissey.

Our analysis of Judge Whipple's treatment of Romano, first at the sentencing hearing and later at the probation revocation hearing, leads us to conclude that Judge Whipple failed to consider any sanction other than incarceration for the probation violation committed by Roman. At the sentencing hearing Judge Whipple made the following statements to Romano in pronouncing sentence:

> [I]t is my intentions [sic] to assess punishment against

you of 20 years in the penitentiary and place you on parole [sic] for a period of five years and probably extend that for another five years for a total of ten years on probation with very strict rules. And a violation of any one of those rules will cause that parole [sic] to be revoked and you sent to the penitentiary . . . .

[Following enumeration of the special conditions of Romano's probation] Now, Mr. Romano, if I get any report back that you have refused any of these items, I will consider it a violation of this parole [sic]. . . . At

that time, I will issue a warrant for your arrest and order you held without bond until we can have a parole [sic] revocation hearing and if at that hearing it is proven that you did refuse to do any of these prescribed items or any of the general rules and conditions of a parole [sic] that are prescribed by Missouri Department of Probation and Parole, then you can anticipate that I will terminate this parole [sic] and order you transported to the reception center of the Missouri Penitentiary in Jefferson City to serve 20 years, do you understand me?

Trial Transcript at 46, 49-50. These statements alone given some indication that the sentencing judge was convinced from the state of the process that Romano was a high-risk candidate for probation.

Romano's marijuana conviction was his first felony offense. His only prior conviction came in 1967 for misdemeanor possession of an unspecified controlled substance, for which he was fined $50. During the 28 months between his arrest and sentencing in the present case his only violation was one traffic ticket for running a stop sign.

Although the pre-sentence investigation report noted that Romano had problems in dealing with authority figures, it also noted that his employers rated his work and work habits as good. One of these employers, Mike Atkinson, the

owner of the Stein Club bar, testified on Roman's behalf at the sentencing hearing.

The pre-sentence investigation recommended concurrent five-year sentences on each count. The prosecutor asked for concurrent ten-year sentences on each count. Instead, Judge Whipple gave Romano probation and concurrent twenty-year suspended sentenced on each count. Twenty years is the maximum sentence provided by Missouri law for this first offense.

The conclusory way in which the sentencing judge announced his decision to revoke Romano's probation provides evidence of his failure to consider alternatives to incarceration. Although significant evidence mitigating the seriousness of Romano's probation violation was presented at the hearing, the sentencing judge's decision does not even acknowledge that evidence. The

incident later determined to be a probation violation occurred outside of the Stein Club, Romano's former place of employment. Romano's car struck Timothy Bradley, a pedestrian with whom Romano was acquainted. Immediately after the incident, Romano stopped the car, let out two passengers, and drove away. The two passengers attended to Bradley. Ten hours after the accident, Romano visited Bradley in his hospital room to check on his condition. While it is true that Romano did not immediately report the accident and that he did leave the scene, given his other post-accident behavior it hardly can be said that he sought to escape responsibility for his actions. The facts do not compel a conclusion that Romano's effort at rehabilitation had failed or that he represented a danger either to himself or to society. A sentencing judge

might reasonably have concluded that continued probation, perhaps with additional conditions, was the proper alternative. The point, however, is not that Judge Whipple imposed incarceration, but that he did so without giving any indication that he considered any of the possible alternatives.

The District Court concluded as follows:

> Judge Whipple indicated to Romano that once it was determined he had violated a condition of his probation, he would terminate Romano's probation and send him to jail. The Court recognizes that such admonitions are commonly used by sentencing judges to inject fear of resulting consequences and

> discourage probation violations. But, when such statements are coupled with a record totally devoid of evidence showing that the judge considered alternatives to incarceration, there prevails a strong inference that the judge harbored a disposition to send Romano to jail for any probation violation, regardless of the nature of the violation and without regard to any other possible options.

567 F.Supp. at 886. The District Court's analysis is consistent with the Missouri Supreme Court's decision in Abel, supra, and also is in keeping with the teaching of Gagnon and Morrissey that once an individual has been given the opportunity

to prove himself through probation or parole, due process protects the liberty interest inherent in that opportunity to the extent that it may not be ended without careful consideration of options other than active prison time.

B. The Remedy Granted by the District Court

The District Court noted that Romano's initial probation term was for five years. He had served only three months of that probationary period at the time his probation was terminated. After serving five and one half years in prison, Romano was released on parole. Appellants Black and Moore argue that, since the conditions of probation are significantly different from the conditions of incarceration, Romano should be returned to his status as a probationer.

The position advanced by appellants Black and Moore if adopted would result in the imposition of a cumulative penalty upon Romano requiring him to serve out the remainder of a five-year probation term, with the possibility of imposition of a further active prison term for a violation, all in addition to the five-and-one-half years he has served in the Missouri State Penitentiary plus one-and-one-half years of conditional freedom while on parole. The District Court, in the sound exercise of its discretion, did not choose to blind itself to the time Romano had served in the custody of the State of Missouri. The District Court noted:

> The Court agrees that conditions of incarceration are different from conditions of probation. The rigors and

> stress associated with imprisonment are far greater than those of probation. The Court finds that Romano has now met the requirement of the law, and hereby orders that he be released from the custody of the Missouri Department of Probation and Parole.

567 F.Supp. at 887. We hold that the District Court did not abuse its discretion in granting this remedy. See Iasigi v. Van de Carr, 166 U.S. 391 (1897).

The order of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

NICHOLAS JAMES ROMANO,)
)
Petitioner,)
)
v.)
)
DR. LEE ROY BLACK, and)
DICK D. MOORE,)
)
Respondents.)

No. 82-1303C(4).

United States District Court,
E.D. Missouri, E.D.

June 20, 1983

CAHILL, District Judge

Reported at 567 F.Supp. 882 (8th Cir. E.D. 1983)

This matter is before the Court on Nicholas James Romano's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Romano claims in his petition that the Honorable Dean Whipple, a Missouri state judge in Laclede County, Missouri, abused his discretion by revoking Romano's probation. Romano alleges two points of error. Romano first alleges that Judge Whipple violated his rights of due process under the Fourteenth Amendment to the United States Constitution when he revoked Romano's probation without considering alternatives to incarceration. Secondly, Romano claims that Judge Whipple violated his due process rights by allowing the material testimony of Jody Seificas, a witness at Romano's probation revocation hearing in

violation of the witness' right against self-incrimination.

I

In November, 1976, Romano pleaded guilty to two counts of an indictment that charged him with transferring and selling a controlled substance. In april, 1977, Judge Whipple sentenced Romano to two concurrent twenty year terms of imprisonment but suspended execution of the sentence and placed him on probation for a period of five years. Romano had been on probation for about three months when Judge Whipple revoked his probation and ordered Romano to begin serving the twenty year prison term. However, Romano was later paroled after serving five and one-half years in jail. Romano still maintains that the revocation of his probation was improper and seeks release from the custody of the Missouri

Department of Probation and Parole. The Court recognized that there was insufficient basis in the record upon which to render an informed decision on Romano's habeas petition. So, the Court held an evidentiary hearing to allow the parties to adduce additional evidence and testimony on this matter. The parties chose not to present testimony and relied solely on the attorney's oral argument. For the reasons discussed below, Romano's petition for writ of habeas corpus is granted.

Along with the generally accepted conditions of probation, Judge Whipple placed Romano on probation with three special conditions: (1) Romano had to submit a drug screen test on demand, (2) his travel was restricted to Boone County, Missouri, unless he obtained prior permission to travel elsewhere, and (3)

Romano had to allow any law enforcement officer to search his personal property at any time. (Tr. at 49, 50). The record is clear that Judge Whipple placed Romano on probation despite the contrary recommendation of the State and the presentence investigation report. But Judge Whipple stated to Romano that

> If . . . it is proven that you did refuse to do any of these prescribed items or any of the general rules and conditions of a parole that are prescribed by the Missouri Department of Probation and Parole, then you can anticipate that I will terminate this parole and order you transported to the reception center of the Missouri Penitentiary in

Jefferson City to serve twenty years, do you understand me?

On June 15, 1977, Romano was involved in a car accident that injured his acquaintance, Timothy Bradley. The sequence of events that followed that accident is somewhat bizarre at best. After the accident Romano was arrested and charged with the felony of leaving the scene of an accident pursuant to Mo.Rev.Stat. § 577.060. Later, the Boone County assistant prosecuting attorney filed an information charging Romano with leaving the scene of the June 15 accident. The information was subsequently amended to charge Romano with the misdemeanor of careless and reckless driving. On July 18, 1977, Judge Whipple revoked Romano's probation after holding a hearing on that issue and imposed the original twenty year

sentence for Romano's underlying drug conviction. Romano was ultimately found guilty of the misdemeanor of careless and reckless driving and was fined $100 plus court costs.

Romano was represented by two lawyers at the probation revocation hearing where many witnesses testified about the June 15, 1977 accident. Witness Gerald Saunders stated that he was in front of the Stein Club in Columbia, Missouri, at approximately 2:00 o'clock A.M. on the day of the accident when he saw a car fitting the description of Romano's automobile swerve into the parking lot of the club and strike Timothy Bradley. Saunders also testified that after the car stopped Jody Seificas and Terry DeHaven emerged from the car and then the automobile drove away. (Tr. at 72.) Saunders further sated that DeHaven later told him that Romano

was the driver of the automobile. (Tr. at 77).

Larry Wright, a police officer who investigated the June 15 accident, testified that he questioned Seificas about the incident and that she told him that Romano was the driver of the car. (Tr. at 87.) Furthermore, Ann Bradley, James F. Bradley, and Colleen Hilbert, the accident victim's mother, father, and sister respectively, all testified that while visiting Timothy Bradley in the hospital Romano came into the hospital room and stated in essence "Why did you jump in front of me" or "It's too bad you jumped in front of me." (Tr. at 102, 107, and 113 respectively.)

Jody Seificas was called to testify at the revocation hearing but continually refused to answer any questions on Fifth Amendment grounds. However, the following

discussion took place between the state's attorney and Seificas.

> Q. by Seitz: Mrs. Seificas, you previously testified and an officer testified to certain statements attributable to you. Now, I'm going to relate those to you. He's testified, you're under oath, that he talked with you the night of this accident and that you told him you were a passenger in the car. Do you admit or deny that?
>
> A. by Seificas: I admit that. (Tr. at 116-17).

The court did not hear Seificas' answer and directed the court reported to reread the question. After the court reporter read the question, Seificas again refused

to answer on Fifth Amendment grounds claiming that she did not understand the question when the state's attorney first posed it to her.

Judge Whipple then entered his findings of fact and concluded that Romano's probation should be revoked. Paragraph 8 of the findings reads: "The Court rules that witness Jody Seificas intelligently understood the questions and knowingly answered the questions and thereby waived the Fifth Amendment constitutional right against self-incrimination and her answer is considered as material in assisting the Court in determining that defendant (Romano) did in fact drive the automobile that struck Timothy Bradley." But, nowhere in the record before this Court, including the transcript of Romano's revocation hearing, is an indication that Judge Whipple

considered what alternatives were available that might be more appropriate than sending Romano to jail for twenty years. The next part of this story is somewhat extraordinary.

Seeking post-conviction relief, Romano filed a pro se motion in the Circuit Court of Laclede County, Missouri, pursuant to Mo.S.Ct.R. 27.26, challenging the probation revocation proceeding. Judge Whipple denied Romano's Rule 272.6 motion because Missouri case law holds that while Rule 27.26 has effectively displaced the state's habeas corpus petition in most cases, probation revocation is an exception to the general rule. Judge Whipple held that the proper remedy lay in a habeas corpus petition. Romano then filed a petition for writ of habeas corpus challenging the probation revocation in the Cole County Circuit

Court, the county of his incarceration. But, Cole County Circuit Judge James T. Riley denied Romano's petition. Judge Riley held that Romano had to file a Rule 27.26 motion in Laclede county where Romano was convicted.

Romano then returned to Laclede County and filed a motion for reconsideration and cited Judge Riley's opinion in support. Judge Whipple again denied Romano's motion and restated the same basis for his ruling as set forth in his original denial of Romano's Rule 27.26 motion filed earlier. Romano then appealed Judge Whipple's ruling in the Missouri Court of Appeals, Southern District, but the appeal was dismissed. Romano next filed a petition for writ of error coram nobis, challenging his reckless driving conviction. That writ was denied. Romano appealed the denial of

the coram nobis writ to the Missouri Court of appeals, Eastern District, but the Court of Appeals dismissed his cause for failure to prosecute.

Romano next filed a petition for writ of habeas corpus with the Honorable John F. Nangle in this district. Judge Nangle adopted the opinion of the Honorable William S. Bahn, United States Magistrate, taht held that the federal court did not have jurisdiction to hear Romano's claim. Romano appealed Judge Nangle's decision to the United States Court of Appeals for the Eighth Circuit but the Eighth Circuit held that Romano had not fully exhausted his available state remedies. The Eighth Circuit noted that Romano could still obtain relief in the state court by filing a habeas corpus petition with the Misosuri Supreme Court. In October, 1982, Romano filed a habeas writ with the Missouri

Supreme Court challenging his probation revocation proceeding bu the Missouri court denied Romano's petition without an opinion. Romano finally filed another petition for writ of habes corpus on which the Court is ruling today.

II

[1-3] The Court initially recognizes that whether to revoke a party's probation because that party violated a condition of his probation is left to the sound discretion of the sentencing judge. United States v. Rifen, 634 F.2d 1142, 1144 (8th Cir. 1980); United Sates v. Alari, 439 F.2d 1349, 1351 (8th Cir. 1971). The sentencing judge need only satisfy himself that the party on probation "abused the opportunity granted him not to be incarcerated." Schneider v. Housewright, 668 F.2d 366 (8th Cir. 1981). Moreover, the burden of proof involved in

a probation revocation proceeding is not as great as that required to convict a person of a crime. United States v. Burkhalter, 588 F.2d 604 (8th Cir. 1978). But, the sentencing judge has two considerations in ruling on a probation revocation, (1) whether the defendant has violated a condition of his probation, and (2) if there are any alternatives to incarceration. Gagnon v. Scarpelli, 411 U.S. 778, 784, 93 S.Ct. 1756, 1760-61, 35 L.Ed.2d 656 (1973); Morrissey v. Brewer, 408 U.S. 471, 479, 92 S.Ct. 2593, 2599, 33 L.Ed.2d 484 (1972). The decision of the sentencing judge to revoke probation cannot be merely a reflexive reaction to technical violations of conditions imposed, because the whole trust of the probation-parole movement is to keep men in the community working with adjustment problems there, and using revocation only

as a last resort when treatment has failed or is about to fail. United States v. Burkhalter, at 606, citing Gagnon v. Scarpelli, 411 U.S. at 785, 93 S.Ct. at 1761.

[4-6] The Court finds, based on the record before the bench and the evidence as stated above in this memorandum, that Judge Whipple did not abuse his discretion in finding that Romano was the driver of the automobile that caused the accident on June 15, 1977, and, thus, committed a crime and violated his probation. Furthermore, the Court finds that even if Judge Whipple improperly considered the testimony of Jody Seificas in reaching a decision to revoke Romano's probation, such consideration was harmless error. Kartman v. Parratt, 535 F.2d 450, 454 (8th Cir. 1976). In light of the remaining evidence that ended to implicate Romano as

the driver of the automobile in the June 15 accident, Judge Whipple likely would have reached the same result even it he had excluded the answer of Seificas. The only error that this Court finds with the revocation hearing held by Judge Whipple is the lack of consideration of alternatives to incarceration. However, the Court finds that such lack of consideration is a fatal flaw that resulted in an abuse of discretion and, therefore, Judge Whipple's deicsion must be overturned. Abel v. Wyrick 574 S.W.2d 411, 419 (Mo. 1978).

The Missouri Supreme Court in Abel v. Wyrick addressed this issue involving the due process requirements for a probation revocation hearing. In Abel, the judge that revoked the defendant's probation had failed to consider alternatives to incarceration before sending the defendant

to jail. Similarly to the attitude displayed by the able Judge Whipple in this case, the judge in Abel sated "The only thing I'm interested in is what you have told me; you violated your probation." The judge continued by stating "There is no use wasting any more time, I'm going to revoke your probation." Although the Missouri high court recognized that in many cases no workable alternatives to incarceration may present themselves, as where a probationer previously convicted of burglary has again committed the same or a similar offense, it concluded that other alternatives were certainly worthy of consideration in that case. 574 S.W.2d at 419. The Missouri court concluded by stating.

> It is clear that the judge did not consider alternatives to incarceration or the

> relative benefits of incarceration to petitioner and to society, as opposed to the benefits of some alternative treatment, but simply decided to incarcerate on the basis of the broken conditions of probation themselves. On these facts, this was an abuse of discretion.

As mentioned above, Judge Whipple indicated to Romano that once it was determined that he had violated a condition of his probation, he would terminate Romano's probation and send him to jail. The Court recognizes that such admonitions are commonly used by sentencing jduges to inject fear of resulting consequences and discourage probation violations. But, when such

statements are coupled with a record totally devoid of evidence showing that the judge considered alternatives to incarceration, there previals a strong inference that the judge harbored a dispostion to send Romano to jail for any probation violation, regardless of the nature of the violation and without regard to any other possible options. Here, Romano was convicted of a misdemeanor that resulted in the injury of Romano's personal friend. Certainly, since the underlying conviction was for a drug offense, alternatives to incarceration should have been considered, on the record, and if Judge Whipple decided still to send Romano to jail, he should have given the reasons why the alternatives were inappropriate. The Court doesnot attempt to exhaust the full range of alternatives that were available to Judge

Whipple, but surely he could have considered public service work, mandatory driver's training classes, or even restitution to Timothy Bradley and his family as viable options. Then if Judge Whipple had still decided to send Romano to jail and stated his reasons for doing so, there would have been prima facie evidence of his deliberations. But under these circumstances the court finds that Judge Whipple abused his discretion by sending Romano to jail without exporing other alternatives that would have better benefited Romanc, the victim, and society, considering the offense for which Romano's probation was revoked and the nature of the conduct leading to revocation.

This Court knows all too well the pressures of time and the frustrations of a beleaguered trial judge whose patience and understanding are taxed to the utmost

in his everyday assignments. Small wonder, then, that the tolerance of the trial judge grows thin when an individual who has been once given a chance to escape imprisonment violates the terms of his probation immediately afterward. But it is really the trial judge who must gauge the measurements of the judicial system, and who must therefore, resist the temptation to overkill.

Of necessity, the appellate courts deal with principles of law and broad verities of truth; they cannot easily evaluate personal distinctions. But the trial judge has a man of flesh and blood before him; he must weigh and measure the effect of judicial decisions, not only on the victim but on the defendant and the community. The scales must be graded in grams and not in tons.

Therefore, the learned trial judge must recollect the circumstances of the sentencing, the factors invovled in the acts leading to revocation, and must consider the alternatives to an original prison sentence. While a busy trial judge is not expected to be encyclopedic in his enumeration of alternatives, it is hardly sufficient merely to recite a mechanical phrase that alternatives were considered. The better policy is for the tiral judge to share his evaluation sa to the inadequacy of alternatives so as to clearly and unequivocally show that he has actually given thought to other approaches besides the original sentence, especially when, as in this matter, the sentence was for a lengthy prison term, while the actions leading to the revocation could only have resulted in minor punishment had the defendant not been on probation.

This Court holds that in the absence of material testimony, agreement of counsel, or specific response to a pleas from the defendant for alternatives to revocation and sentence, the trial court must express a rudimentary explanation for the rejection of alternatives. A record devoid of anything but a mere recital that alternatives had been considered and denied does not comport with justice. But here there is not even a naked assertion of the rejection of alternatives. This Court is not convinced that the harassed trial judge gave judicial thought to the alternatives to incarceration.

The Court's next step is to fashion a remedy for Romano. As stated earlier, Romano had served only about three months of his probationary period before Judge Whipple revoked his probation. Romano then served five and one-half years in the

custody of the Missouri Department of Corrections at the Jefferson City penitentiary. The court's finding today that Judge Whiple abused his discretion by revoking Romano's probation without considering alternatives to icnarceration places Romano back in the position he would have been in had probation not been revoked--on probation. Since Romano spent over five years in jail the Court finds that the probationary period has now expired. Respondent argues that if the court grants the habeas writ, the Court should place Romano back on probation and allow him to serve its duration, which is four years and nine months. Respondent maintains that conditions of probation are different from conditions of incarceration and therefore the Court should not allow time spent in the custody of the Missouri department of Corrections to apply toward

Romano's probationary period. The court agress that conditions of incarceration are different from conditions of probation. The rigors and stress associated with imprisonment are far greater than those of probation. The Court finds that Romano has now met the requirement of the law, and hereby orders that he be released from the custody of the Missouri Department of Probation and Parole.

Romano's petition for writ of habeas corpus is granted.

ORDER

In accordance with the memorandum filed this day and incorporated herein,

IT IS ORDERED that Nicholas James Romano's petition for writ of habeas corpus is GRANTED.

United States Court of Appeals
for the Eighth Circuit

83/2000/2001-EM	*
September Term,	
NICHOLAS JAMES ROMANO,	*
	*
Appellee/Cross Appellant,	*
	*
VS.	*
	*
DR. LEE ROY BLACK AND	*
DICK D. MOORE,	*
	*
Appellants/Cross Appellees.	*

Appeals from the United States District Court for the Eastern District of Missouri

Petition of appellants/cross appellees for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

June 28, 1984

Filed 9-29-84

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-465

DR. LEE ROY BLACK,
Director of the Missouri Department of
Corrections and Human Resources,

DICK D. MOORE,
Chairman, Missouri Board of Probation and Parole,

Petitioners,

v.

NICHOLAS JAMES ROMANO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Nicholas James Romano, respectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 735 F.2d 319 (8th Cir. 1984). The district court's opinion is reported at 567 F.Supp. 882 (E.D. Mo. 1983). These opinions are reproduced in the Appendix to the Petition for a Writ of Certiorari, No. 84-465, October Term, 1984.

JURISDICTION

On May 31, 1984, the Eighth Circuit affirmed the district court's order granting respondent's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The petition for rehearing was denied on June 28, 1984. This Court's jurisdiction is based on 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent has included quotations from the pertinent constitutional and statutory provisions in Appendix A. These provisions include the following:

1. United States Constitution, Amendment XIV;
2. 28 U.S.C. §2254(a)-(d);
3. 28 U.S.C. §2243; and
4. Mo. Rev. Stat. §549.111.1 (1963, as amended 1967) (repealed by L. 1977, p. 658, eff. January 1, 1979).

STATEMENT OF THE CASE

I. Procedural History

On December 10, 1974, respondent, Nicholas James Romano ("Romano"), was arrested for transferring and selling marijuana. Tr. at 6, 32.[1] On November 15, 1976, Romano entered guilty pleas before the Honorable Dean Whipple, 26th Judicial Circuit, Laclede County, Missouri to two counts of an indictment alleging that Romano transferred (Count I) and sold (Count II) marijuana. Tr. at 2, 3, 4. On April 13, 1977, Judge Whipple sentenced Romano to two concurrent twenty-year terms of imprisonment, but suspended execution of the sentence and placed Romano on probation for five years, the maximum term allowed under Missouri law. Tr. at 46, 53, 54.

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[1]The term "Tr." refers to the transcript of Romano's guilty plea, sentencing, and probation revocation hearings which was part of the record in the Eighth Circuit and district court below. The term "D.R." refers to the record, other than the transcript, which the parties designated in the Eighth Circuit. The term "Pet." refers to the Petition for a Writ of Certiorari No. 84-465, October Term, 1984. (The Clerk of this Court rejected and refused to docket petitioners' original petition for certiorari which respondent received on August 31, 1984. Respondent received a second petition on September 24, 1984. All page citations refer to this second petition.) The term "Br." refers to Romano's opening brief in the Eighth Circuit.

On June 15, 1977, Romano was arrested and charged with the felony of leaving the scene of an accident. On July 18, 1977, Judge Whipple held a probation revocation hearing in which he revoked Romano's probation and imposed a twenty year sentence for his underlying marijuana conviction. Tr. at 134 and Court's Memorandum of Findings: D.R. at 47-49.[2]

The State of Missouri filed a First Amended Information charging Romano with the misdemeanor of careless and reckless driving for his conduct arising out of the car accident on June 15, 1977. D.R. at 52. On October 12, 1977, Romano pleaded not guilty to the careless and reckless driving charge, but the court found Romano guilty and fined him $100.00 and costs. D.R. at 53.

In an effort to obtain post-conviction relief, on March 28, 1980, Romano, representing himself pro se, filed a motion in the Circuit Court of Laclede County, Missouri, pursuant to Mo. S. Ct. Rule 27.26, seeking to challenge the constitutionality of his probation revocation proceeding. See appropriate docket sheet entries, D.R. at 54-57. On July 11, 1980, Judge Whipple denied Romano's petition based on Missouri law which holds Romano's proper procedural remedy was to file a State habeas corpus petition challenging the probation revocation.

Relying on Judge Whipple's ruling, Romano filed a habeas corpus petition in the Circuit Court of Cole County, the county in which he was incarcerated. D.R. at 58-62. Cole County Circuit Judge James T. Riley, however, improperly denied Romano's petition when he held that Romano's proper procedural

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[2]After ruling that Romano's probation should be revoked, Judge Whipple was required, under Missouri law, to execute the twenty year sentence which he had originally imposed and suspended. Judge Whipple had no authority to reduce this sentence. Wagner v. Ruddy, 582 S.W.2d 692, 693-95 (Mo. en banc 1979); State v. Lynch, 670 S.W.2d 113, 114 (Mo. App. 1984); Mo. Rev. Stat. §549.101.1 (1963, as amended 1965) (repealed by L. 1977, p. 658, §1, eff. January 1, 1979).

remedy was to file a Mo. S. Ct. Rule 27.26 motion in Laclede County, Missouri. D.R. at 63.[3]

Relying on Judge Riley's opinion, Romano returned to the Laclede County, Missouri, Circuit Court and filed a Motion For Reconsideration under Mo. S. Ct. Rule 27.26. D.R. at 64-65. Judge Whipple denied Romano's motion. D.R. at 66-67. Romano's subsequent appeal to the Missouri Court of Appeals, Southern District, was dismissed on February 3, 1981. See appropriate docket sheet entries, D.R. at 54-57.

Continuing his efforts to have a court hear the merits of his claim, while at the same time feeling totally confused as how to proceed, on April 14, 1980, Romano filed a Petition For A Writ of Error Coram Nobis, challenging the constitutionality of his reckless driving conviction. The trial court refused to grant Romano's petition. Romano then perfected an appeal with the Missouri Court of Appeals, Eastern District, but on November 18, 1980, the Missouri appellate court dismissed his appeal for failure to prosecute. D.R. at 68.

After failing in his numerous efforts to obtain relief from the Missouri courts, on June 13, 1981, Romano filed, pursuant to 28 U.S.C. §2254, a petition for a writ of habeas corpus with the United States District Court for the Eastern District of Missouri. On October 2, 1981, the Honorable John F. Nangle accepted Magistrate William H. Bahn's recommendation to deny Romano's habeas petition on procedural grounds. D.R. at 72.[4]

Romano appealed the district court's ruling to the Eighth Circuit. The court dismissed Romano's claims challenging the

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[3]Petitioners concede that Judge Riley's decision was contrary to Missouri law. Pet. at 3.

[4]As to the merits of Romano's complaint, Magistrate Bahn expressed sympathy for Romano's plight when he wrote, "[i]f, indeed, the resultant twenty-year sentence was inflicted because of the charge of careless and reckless driving, it was an awesome consequence." D.R. at 71.

constitutionality of his reckless driving conviction. Romano v. Wyrick, 681 F.2d 555, 556 (8th Cir. 1982). The court held, however, that Romano could still challenge the constitutionality of his probation revocation proceeding in the Missouri Supreme Court. Id. at 556-57. The Eighth Circuit also ruled that if the Missouri Supreme Court denied relief to Romano, he could return to the federal courts under 28 U.S.C. §2254. Id.

On October 4, 1982, Romano filed a habeas corpus petition with the Missouri Supreme Court, challenging the constitutionality of his probation revocation proceeding. Missouri Supreme Court, No. 64425. On October 18, 1982, the Missouri Supreme Court denied Romano's petition without an opinion. D.R. at 79-80.

On November 4, 1982, Romano filed, pursuant to 28 U.S.C. §2254, a new habeas corpus petition with the United States District Court, Eastern District of Missouri, in which he challenged the constitutionality of his probation revocation proceeding. On December 17, 1982, while this action was still pending, Romano was placed in the custody of the Missouri Department of Probation and Parole, pursuant to Mo. Rev. Stat. §549.261(1) (1978, as amended). D.R. at 89; Romano's parole term expires in 2002. Id. On June 20, 1983, the Honorable Clyde S. Cahill granted Romano a writ of habeas corpus and ordered his unconditional release from the custody of the Missouri Department of Probation and Parole. Romano v. Black, 567 F. Supp. 882 (E.D. Mo. 1983).

Petitioners Black and Moore appealed Judge Cahill's decision to the Eighth Circuit. On May 31, 1984, the Eighth Circuit affirmed Judge Cahill's order. The court of appeals denied rehearing on June 28, 1984.

II. Facts Relating to Romano's Guilty Plea and Sentencing Hearings

The following facts which emerge from Romano's guilty plea and sentencing hearings, Tr. at 1-54, indicate that substantial evidence exists to prove that Judge Whipple abused his judicial discretion in his earliest dealings with Romano:

1. Romano pleaded guilty to the charge of transferring and selling marijuana in excess of 35 grams. Tr. at 2-3. The marijuana had a value of approximately $3,000 to $3,200. Tr. at 39.

2. Contrary to petitioners' assertion, Pet. at 9, the "heroin" involved in Romano's sale of marijuana actually consisted of a baking soda and pancake mix. Romano's Br., Addendum "A", Supplemental Pre-Sentence Investigation Report at 1. Thus, the State of Missouri only sought an indictment for Romano's transfer and sale of marijuana. Tr. at 2-3.

3. Romano pleaded guilty even though he may have had a meritorious entrapment defense as the State of Missouri had used informers to introduce Romano to various drugs prior to the State's use of informers to arrange for the actual marijuana sale for which Romano was convicted. Tr. at 9-10.

4. Romano had no prior felony convictions, Tr. at 32, and had only a very insignificant misdemeanor conviction for which he received a $50 fine with no term of imprisonment. Romano's Br., Addendum "B-1", Supplemental Pre-Sentence Investigation Report at 2. Indeed, his prior record was so clean that the "Adult Face Sheet," prepared by the Missouri Department of Social Services, indicates that Romano had no prior "prison" or "non-prison" sentences. D.R. at 78.

5. During the 28-month period between Romano's arrest and his sentencing hearing (December, 1974 to April, 1977), Romano did not commit any criminal offenses with the exception of a minor traffic ticket he received in February, 1977. Tr. at 32.

6. Judge Whipple sentenced Romano to an incredibly excessive prison term of twenty years even though the pre-sentence investigation report had recommended only five years, Romano's Br., Addendum B-2, Pre-Sentence Investigation Report at 5, and the prosecutor had recommended ten years. Tr. at 39.[5] Judge Whipple's sentence is bizarre and indicates an abuse of discretion for two reasons:

(a) The prison term is excessive on its face based on the nature of Romano's offense.[6]

(b) Suspending execution of an extraordinarily severe prison sentence and granting probation, which ostensibly indicates that Judge Whipple believed Romano could be rehabilitated within the community and did not require incarceration, reflects Judge Whipple's shocking ignorance of the policies underlying the probation system.

7. Judge Whipple's statements on the record indicate that he "harbored a disposition to send Romano to jail for any probation violation, regardless of the nature of the violation

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[5]Romano also presented substantial evidence at his sentencing hearing that his conviction did not require imprisonment. Romano's employer, Mike Atkinson, testified that Romano "does a good job . . . he's conscientious about his work and he's never been any problems (sic)." Tr. at 30. In addition, Dr. Sheldon Silk's psychological evaluation of Romano was tendered to Judge Whipple as an exhibit. Tr. at 18, 36. Dr. Silk opined that Romano was a good candidate for probation. Tr. at 36.

[6]A 1981 study of the average prison sentence for specific offense categories for defendants sentenced in the United States district courts reveals that the average sentence for a felony marijuana conviction was 47.4 months as compared with the 240-month sentence Romano received from Judge Whipple. The only offense with which Romano's sentence statistically compares is first-degree murder (251.6 months). These statistics do not differentiate between first and subsequent offenses, thus making Romano's 240-month sentence for a first felony offense even more shocking. See Romano's Br., Addendum K at 4.

and without regard to any other possible options." Romano, 735 F.2d at 323, quoting from Romano, 567 F. Supp. at 886. See also Romano, 735 F.2d at 322.

III. Facts Relating to Romano's Probation Revocation Hearing of July 18, 1977.

Judge Whipple revoked Romano's probation because he believed sufficient evidence existed to support the State of Missouri's allegations that Romano had committed the felony of leaving the scene of an accident. Tr. at 134; D.R. at 47-49. Judge Whipple's findings were based on the disputed facts relating to a car accident on June 15, 1977, in which Romano's car allegedly struck his close friend, Timothy Bradley, outside of the Stein Club in Columbia, Missouri. The probation revocation transcript, however, casts substantial doubt on Judge Whipple's factual finding that Romano was the driver of the car which struck Bradley, as well as his legal finding that Romano committed a "hit and run" felony. Judge Whipple based his findings upon circumstantial and hearsay evidence, as well as critical testimony which was inadmissible even under the liberal evidentiary standards which apply to probation revocation proceedings.[7]

Timothy Bradley, the victim of the accident, who suffered only minor injuries, testified that he could not identify the driver of the car which struck him. Tr. at 63. Gerald Saunders, an eyewitness to the accident, testified that Jody

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[7]Judge Whipple's reliance on the "material" testimony of Jody Seificas, Romano's girlfriend, who was allegedly a passenger in the car and, according to one eyewitness, possibly the car's driver, is the central legal issue involved in Romano's conditional cross-petition for a writ of certiorari which was filed contemporaneously with this opposing brief. As fully developed in Romano's cross-petition, the record reflects Judge Whipple's flagrant error in ruling that Miss Seificas' testimony could be admitted despite her persistent refusal to testify based upon her fifth amendment right against self-incrimination. This evidentiary error was so significant that it violated Romano's fourteenth amendment due process right to a fair hearing.

Seificas, Romano's girlfriend, left the car from the driver's side, Tr. at 72-73, and he thought that Seificas was the driver of the car. Tr. at 74. Saunders also stated that Terry DeHaven, a passenger in the car, told him later that Romano was driving the car. Tr. at 79. DeHaven's recollection, however, was not credible because DeHaven testified that he was drunk ("totally smashed") prior to leaving the Stein Club with Romano. Tr. at 69. DeHaven also stated that he had "passed out" in Romano's car and only awoke after the impact of the accident. Tr. at 65-66. Finally, DeHaven testified that he did not know the identity of the car's driver. Tr. at 69. In light of DeHaven's testimony, it is difficult to understand how Judge Whipple could have relied on his statement to Saunders that Romano was driving the car. See Judge Whipple's "Memorandum of Findings," D.R. at 47-49.

Larry F. Wright, a Columbia, Missouri, police officer who investigated the scene after the accident, testified that, on a street approximately six blocks from the accident, he located the car allegedly involved in the accident. Tr. at 89. Wright also stated that Jody Seificas had told him that Romano was driving the car. Tr. at 87. Seificas, however, refused to give a statement at the police station. Tr. at 88.

Seificas also repeatedly exercised her fifth amendment right against self-incrimination and refused to answer numerous questions about the accident at the revocation hearing. Tr. at 82-84. Upon being called a second time during the hearing, Seificas responded to an extremely confusing compound question about whether she had spoken with a police officer about the accident and whether she had told him that she was a passenger in the car. She later testified that she did not understand the question and, after the question was more clearly asked a second time, Seificas refused to answer, invoking her fifth

amendment privilege. Judge Whipple, however, ruled that Seificas had waived her fifth amendment privilege and also stated that he considered her testimony to be "material" in his finding that Romano was the driver of the car which struck Bradley. Tr. at 116-122; D.R. at 47-49.

Judge Whipple also relied on the testimony of members of Timothy Bradley's family who all offered almost identical testimony. Bradley's mother, father, and sister were visiting Timothy in his hospital room on Sunday morning, June 15, 1977, approximately ten hours after the accident occurred. Romano arrived to visit Bradley and, according to Bradley's mother, told Timothy, "It's too bad you jumped in front of me." Tr. at 101.[8]

The family's testimony, however, was not very credible. Both of Bradley's parents acknowledged that they had retained a local law firm to represent Timothy in a personal injury action arising out of the car accident. Tr. at 102-03, 113. Timothy Bradley offered no testimony concerning his alleged conversation with Romano about the accident. Tr. at 57-64, 102. Moreover, Greg Fallon testified that he was also in Bradley's hospital room during Romano's visit. Tr. at 124. While Fallon recalled the conversation between Bradley and Romano and was present for the entire conversation, he did not recall hearing Romano make any statements to Bradley concerning the car accident. Tr. at 125.

Judge Whipple evaluated the evidence for only three minutes, Tr. at 134, before ruling that:

1. Romano was driving the car which struck Bradley;

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[8] Mrs. Mary Ann Bradley offered this testimony verbatim. Bradley's sister and father offered almost identical testimony. Tr. at 107, 113.

2. Romano committed the felony of leaving the scene of an accident and, therefore, violated the general condition of his probation agreement in which he had agreed to obey all of the laws of the State of Missouri;[9] and

3. Romano's probation should be revoked and his underlying twenty year prison term should be executed. Tr. at 135-136; D.R. at 47-49: Judge Whipple's written findings of fact and conclusions of law.

Judge Whipple abused his discretion in making each of these three critical findings. First, Judge Whipple's finding that Romano was the driver of the car which struck Bradley is marred by Judge Whipple's erroneous consideration of the "material" testimony of Jody Seificas. Judge Whipple's decision hinged on Seificas' critical testimony. Judge Whipple, however, committed prejudicial error when he ruled that Seificas voluntarily waived her fifth amendment right against self-incrimination. See Romano's Conditional Cross-Petition for a Writ of Certiorari," No. _____, October Term, 1984, at 3-10.

Second, Judge Whipple found that Romano committed a "hit and run" felony despite the evidence which indicated that Romano lacked the requisite intent. Judge Whipple never explained how Romano, an alleged hit and run felon, would:

1. Allow all of his passengers to leave the car to attend to Bradley, notwithstanding the fact that numerous bystanders were present at the parking lot of the Stein Club who could also attend to Bradley. Tr. at 57, 85, 92; and

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[9] Romano was given three special conditions of probation which were related to his underlying marijuana conviction and required him to: (1) submit to a drug screening test on demand; (2) restrict his travel; and (3) allow a law enforcement officer to search his personal property at any time. Tr. at 49, 50. The State of Missouri never alleged that Romano violated one of these special probation conditions.

2. Visit his close friend, Bradley, at his hospital room only ten hours after the accident. (Romano was ultimately arrested in Bradley's hospital room for the alleged felony). Tr. at 115.

Romano's conduct proved that he did not intend to escape responsibilities for his actions.[10]

Third, and most importantly, Judge Whipple erred in his decision to revoke Romano's probation without considering alternatives to incarceration. The transcript reveals that Judge Whipple never discussed the reasons why the obvious alternatives to incarceration (for example, fine, restitution, drivers' training classes, or public service work) would not be more appropriate than sending Romano to jail for twenty years, especially when Romano's alleged probation violation had no rational relationship to Romano's original conviction. See Romano, 567 F. Supp. at 886-887.

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[10]The State of Missouri's prosecution of Romano for violating the hit and run statute confirms the fact that Judge Whipple lacked evidentiary support for his ruling. The State reduced the hit and run charge to careless and imprudent driving, D.R. at 52, of which Romano was ultimately convicted. D.R. at 53. Romano did not receive this reduced charge as a result of a plea bargain because the record indicates that Romano pleaded "not guilty" and vigorously defended himself against the careless and reckless driving charge. D.R. at 53.

SUMMARY OF THE ARGUMENT AND REASONS FOR DENYING THE WRIT OF CERTIORARI

The Missouri trial court revoked respondent Romano's probation for a technical violation which had no rational relationship to Romano's underlying marijuana conviction. The district court and the Eighth Circuit, therefore, correctly held that Judge Whipple abused his discretion and violated Romano's due process rights by not considering alternatives to incarceration before revoking Romano's probation and imposing an exceedingly harsh twenty year prison sentence. Numerous federal and state courts, as well as expert observers of the criminal justice system, have also endorsed the modern penological view that courts should consider alternatives to incarceration before revoking probation.

The Eighth Circuit properly applied Gagnon v. Scarpelli, 411 U.S. 778 (1973) in finding that Judge Whipple violated Romano's due process rights at his probation revocation hearing. This Court's recent decision in Bearden v. Georgia, _____ U.S. _____, 76 L.Ed.2d 221 (1983), which discussed an indigent probationer's due process rights, is factually distinguishable from Romano, and, therefore, was not discussed by the Eighth Circuit. Bearden, however, follows Gagnon in holding that courts must consider alternatives to incarceration before revoking probation. Bearden, therefore, lends additional support to Romano.

The courts below also correctly held that the State of Missouri must release Romano from all further custody. Romano's five year probation term expired in 1982. The State, therefore, no longer has jurisdiction or custody over Romano's person to conduct a retrospective probation revocation hearing which conforms with due process. Moreover, due process requires the courts to conduct a probation revocation hearing shortly

after a probation violation occurs. It would be impractical and unfair to allow the State to conduct a retrospective hearing concerning events which occurred seven and one-half years earlier.

The Eighth Circuit carefully wrote Romano to limit its precedential importance to the unique factual circumstances with which it was confronted. Rather than creating new law, the appellate court applied well-established precedents to remedy the gross injustice to which Jim Romano was subject. The Eighth Circuit's opinion, therefore, does not merit this Court's review and the petition for a writ of certiorari should be denied.

ARGUMENT AND REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE MISSOURI TRIAL COURT VIOLATED RESPONDENT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY FAILING TO CONSIDER ALTERNATIVES TO INCARCERATION.

In Gagnon v. Scarpelli, 411 U.S. 778 (1973), this Court enunciated the minimum due process standards which a state must meet if it wishes to revoke an individual's probation. These standards comprise the "process" due to all probationers by guaranteeing that the state does not arbitrarily revoke a probationer's significant liberty interest. Gagnon recognized that a court must make two fundamental determinations in deciding whether to revoke an individual's probation: (1) whether the probation terms were actually violated; and (2) if the terms of the probation were violated, "[s]hould the parolee (or probationer) be recommited to prison or should other steps be taken to protect society and improve chances of rehabilitation?" Gagnon, 411 U.S. at 784, citing Morrissey v. Brewer, 408 U.S. 471, 479-80 (1972).[11]

In exploring the rationale for requiring a trial judge to consider alternatives to incarceration, Gagnon identified various competing interests:

> Both the probationer or parolee and the State have interests in the accurate findings of fact and the informed use of discretion -- the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

411 U.S. at 785.

The Court also emphasized that rehabilitation, not punishment, is the focus of the probation/parole system.

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[11] Morrissey established the due process requirements for parole revocation proceedings and Gagnon applied these requirements to probation revocation proceedings.

> The whole thrust of the probation/parole system is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail. (emphasis added).

Id. Probation should be revoked only when the trial court is convinced that the probation violator's conduct is so bad that he or she "cannot be counted on to avoid anti-social activity." Morrissey, 408 U.S. at 479. A court must, therefore, find "significant violations of the conditions of probation" before revoking an individual's probation. Gagnon, 411 U.S. at 784, n.8 (emphasis added).

Gagnon and Morrissey also require the trial judge to consider alternatives to incarceration on the record so that the appellate court can meaningfully review the trial court's ruling. Thus, the trial judge must provide "a written statement . . . as to the evidence relied on and reasons for revoking (probation or parole)." Gagnon, 411 U.S. at 486, citing Morrissey, 408 U.S. at 489 (emphasis added).

The Eighth Circuit correctly applied the teachings of Gagnon when it held that the trial court abused its discretion and violated Romano's due process rights by failing to consider alternatives to incarceration before revoking Romano's probation. Romano, 735 F.2d at 321-24. The record supports the Eighth Circuit's ruling for three reasons. First, the transcript reveals that Judge Whipple never considered alternatives to incarceration. Romano, 735 F.2d at 323; Romano, 567 F. Supp. at 884, 886. Second, the record reflects that Judge Whipple's disposition to revoke Romano's probation for any probation violation. Id. Third, Romano's alleged probation violation -- a traffic accident that resulted in a $100.00 fine for careless driving -- had no rational relationship to Romano's underlying marijuana conviction. Moreover, as the district court observed, "the actions leading to the revocation would only have resulted in minor punishment had the defendant not

been on probation." Romano, 567 F. Supp. at 887. The Eighth Circuit, therefore, had little difficulty in finding that Judge Whipple abused his discretion in revoking Romano's probation and sending him to jail for twenty years.

II. FEDERAL AND STATE COURTS HAVE UNIFORMLY HELD THAT THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE REQUIRES TRIAL COURTS TO CONSIDER ALTERNATIVES TO INCARCERATION BEFORE REVOKING PROBATION; NO CONFLICT OF AUTHORITIES, THEREFORE, EXISTS AMONG STATE OR FEDERAL COURTS.

Numerous federal and state courts which have considered the constitutional standards for probation revocation proceedings have followed the Morrissey/Gagnon requirement that a court must consider alternatives to incarceration and other mitigating evidence before revoking probation or parole. We briefly summarize the holdings of these cases: United States v. Reed, 573 F. 2d 1020, 1024-25 (8th Cir. 1978) (before revoking probation, the court must consider whether violations are sufficiently serious to justify revocation and whether alternatives to incarceration would be more appropriate); Atkins v. Marshall, 533 F. Supp. 1324, 1329 (S.D. Ohio 1982) (in expressing its reasons for revoking probation, the trial court must consider whether reincarceration would best improve the probationer's hopes of rehabilitation); Lawrence v. Smith, 451 F. Supp. 179, 189 (W.D. N.Y. 1978) (parole board must explain its reasons for revoking parole rather than taking alternative action); Abel v. Wyrick, 574 S.W. 2d 411 (Mo. en banc 1978) (abuse of discretion as a matter of law for a court to revoke probation without considering alternatives to incarceration, especially when probation violation is technical and unrelated to underlying conviction)[12]; Commonwealth v. Vasquez, 389

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[12]Both the district court and the Eighth Circuit considered Abel to be strikingly similar to the facts at bar. This Court will note that petitioners' counsel, the Attorney General of the State of Missouri, by arguing that Judge Whipple had no duty to consider alternatives to incarceration, is taking a position which conflicts with the opinion of the Missouri Supreme Court as expressed in Abel.

A. 2d, 111, 113-14 (Pa. Super. 1978) (reversing trial court's order revoking probation and parole as it made no specific finding that, inter alia, probation-parole violation deserved imprisonment rather than alternative rehabilitative procedures); State v. Ruby, 650 P. 2d 412, 414 (Alaska App. 1982) (proof of probation violation is insufficient to revoke probation as the court must also determine whether rehabilitation of petitioner would be furthered by alternatives to imprisonment such as continuation of petitioner's probation); State v. Austin, 295 N.W. 2d 246, 250 (Minn. 1980) (court must "find that the need for confinement outweighs the policies favoring probation" before revoking probation).[13]

Petitioners suggest that United States v. Bazzano, 712 F. 2d 826 (3rd Cir. en banc), cert. denied, _____ U.S. _____, 104 S.Ct. 1004 (1983), indicates that a conflict exists among the circuits as to whether a trial court must consider

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[13]Numerous criminal law experts have endorsed the modern penological view that a trial court should consider alternatives to incarceration before revoking probation. See, e.g., ABA Standards For Criminal Justice, Standard 18-7.3(c) and (d), 2d Ed.(1980); Model Penal Code, §301.2; National Advisory Commission, Corrections, Standard 5.4; Model Sentencing And Corrections Act, §§3-304 to 3-310; D. M. Gottfredson, L. Wilkins, and P. Hoffman, Guidelines For Parole And Sentencing, (1978); M. R. Gottfredson, D. M. Gottfredson, Decision Making And Criminal Justice: Towards A Rational Exercise Of Discretion, (1980).

This Court's decisions requiring the trial judge to consider alternatives to incarceration implements several important social policies by:

1) Guaranteeing that the trial court's decision is not arbitrary but is based upon an understanding of the policies underlying the probation system and the concept of rehabilitation within the community;

2) Preserving meaningful appellate review of revocation decisions;

3) Protecting the interests of the probationer and society which are mutually dedicated to making the criminal justice system, in general, and the probation system, in particular, fair and legitimate.

See generally Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

alternatives to incarceration before revoking probation. Pet. at 19-21. Petitioners are plainly wrong as Bazzano does not even address the issue of alternatives to incarceration. Bazzano simply held that after deciding to revoke probation, the trial court need not state its reasons for imposing the original suspended sentence which it had given to the probationer after his initial conviction. 712 F.2d at 838-39. This holding follows the general rule that federal trial judges have no duty to explain the reasons underlying their sentencing decisions. The trial court's duty to consider alternatives to incarceration before revoking probation is an entirely different issue.

III. THE EIGHTH CIRCUIT'S RULING DOES NOT CONFLICT WITH BEARDEN V. GEORGIA, _____ U.S. _____, 76 L.Ed.2d 221, 103 S. Ct. 2064 (1983).14/

Bearden v. Georgia raised the question of whether a court could automatically revoke probation for an indigent's failure to pay a fine or make restitution. Five Justices held that

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14/ Petitioners have waived their argument that Bearden conflicts with Romano by not presenting their "new" interpretation of Bearden to the Eighth Circuit. See Burst v. Adolph Coors Co., 650 F. 2d 930, 932 n.1 (8th Cir. 1981) (appellate court will not consider an issue on which counsel took a contrary position in the court below).

In their appellate briefs, petitioners cited Bearden, but did not argue that it conflicted with the district court's opinion in Romano. In his appellant's brief, respondent argued that Bearden supported the district court's opinion in Romano. The Eighth Circuit panel questioned petitioners' counsel at oral argument about Bearden and thus offered the State of Missouri an opportunity to comment on the relevance of Bearden. Respondent's counsel filed a motion with the Eighth Circuit on August 31, 1984, seeking leave to hire a court reporter to transcribe these oral arguments so that this Court could evaluate petitioners' former position on Bearden. The Eighth Circuit has not ruled on respondent's motion as of the date that this brief was mailed to this Court. Petitioners also did not even cite Bearden in their "Petition for Rehearing" filed in the Eighth Circuit.

Finally, in evaluating the waiver issue, this Court should consider that sixteen of the twenty-six cases cited by the petitioners in their petition for a writ of certiorari were not cited or discussed by the district court, court of appeals, or either party in any of its briefs below.

"it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available . . . ." 76 L.Ed.2d at 230. Four Justices concurred in the result but dissented as to the trial court's duty to consider alternatives to incarceration. Id. at 234-35. Neither the majority nor the concurring opinions, however, suggested that Bearden modified this Court's prior decisions in Morrissey and Gagnon.[15]

Bearden should be limited to the unique context of indigent probationers who cannot pay their court-imposed fines or make the required restitution. Petitioner Bearden occupied the position of both an indigent and a probationer which gave him two different due process interests. The majority and concurring Justices in Bearden, however, focused on Bearden's due process interests as an indigent based upon Justice Harlan's concurring opinions in Williams v. Illinois, 399 U.S. 235, 259 (1970) and Tate v. Short, 401 U.S. 395, 401 (1971), rather than on his due process interests as a probationer under Gagnon. Bearden, 76 L.Ed.2d at 233 n.12, 235.

Petitioners suggest that Bearden limits the requirement to consider alternatives to incarceration to cases in which the probationer intentionally violated his probation. Even if one assumes that petitioners' contention is correct, Romano was still properly decided because the record indicates that Romano's alleged probation violation of striking his friend with his car in a dark parking lot was not an intentional act.

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[15] In Morrissey, Justices Brennan and Marshall concurred with the majority opinion because they felt the Court's opinion did not sufficiently expand the due process rights to which a parolee is entitled. 408 U.S. at 490-91. Justice Douglas dissented because he did not agree with the specific due process guidelines which the majority of the Court established. Id. at 491-500. This Court's decision in Gagnon was almost unanimous. Justice Douglas dissented in Gagnon solely because he contended that the due process clause required the appointment of counsel for Mr. Scarpelli. 411 U.S. at 791.

Automobile accidents are unfortunate everyday occurrences. Individuals who are involved in isolated car accidents should not be condemned as possessing antisocial personalities which threaten the welfare of society.

Justice O'Connor, however, noted that "fault" was a relevant consideration only in cases which presented facts which resembled Mr. Bearden's peculiar predicament. Bearden, 76 L.Ed.2d at 230 n.9. If it were feasible to adopt a general rule as to when alternatives to incarceration must be considered, a court would more likely focus on whether the probation violation was minor or technical[16] and whether it had any rational relationship to the underlying conviction. Thus, Romano's technical violation of careless driving, which had no relationship to his underlying marijuana conviction, triggered Bearden's requirement that the Missouri trial court had a duty to consider alternatives to incarceration before revoking Romano's probation.

This Court should find that Romano's liberty interest in his right to complete his probation term[17] directly related to the statistical probability that he would have successfully complete his probation. As Romano's success probabilities were very high, Judge Whipple was constitutionally required to make

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[16]The Annual Report Of The Director Of The Administrative Office Of The United States Courts for the years ending June 30, 1980, 1981, and 1982, defines a "minor" probation violation as "drunk[eness], disorderly [conduct], petty theft, traffic violation, etc. when sentence is 90 days or less imprisonment, or 1 year or less probation, or a fine." See Br. at A-14 to A-16 (Addendums E, F and G). Romano's careless and reckless driving conviction would certainly fall into the "minor offense" classification.

[17]Romano's due process rights were triggered by Judge Whipple's initial decision to place him on probation. "The decision to place the defendant on probation . . . reflects the determination by the sentencing court that the State's penological interests do not require imprisonment." Bearden, 76 L.Ed.2d at 221. (citations omitted).

a substantial showing that Romano's probation right could be taken away from him. Statistically, courts generally continue probations despite the probationer's commission of a minor violation. Courts have ordered revocations for minor violations in 2% or less of the cases studied.[18]

Bearden's holding that alternatives to incarceration need not be considered when an indigent intentionally fails to make restitution merely amplifies on the well-established prejudicial/harmless error rule. Chapman v. California, 386 U.S. 18 (1967); Kartmann v. Parratt, 535 F.2d 450, 454 (8th Cir. 1976). The Justices in the majority in Bearden, (and perhaps the concurring Justices as well), were concerned with the factual circumstances in which the trial court's failure to consider alternatives to incarceration amounts to underlying prejudicial error and is, therefore, reversible. Judge Whipple's decision to revoke Romano's probation without considering alternatives to incarceration should be included in the category of prejudicial error.[19]

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[18]Romano has thoroughly presented the supporting statistical authorities in his Eighth Circuit brief at 43-45; addendums D, E, F, G, H, and I at A-8 to A-23. These statistical studies include national, federal and state probation information as well as studies conducted solely in Missouri. Petitioners never challenged these statistics in their briefs filed in the Eighth Circuit.

[19]Under the prejudicial/harmless error analysis, the trial court should consider alternatives to incarceration in all probation revocation hearings. If the trial court, however, errs and fails to consider alternatives to incarceration, the appellate court can decide whether the state has met its burden of proof to show that the error was harmless beyond a reasonable doubt. The Missouri Supreme Court in Abel v. Wyrick implied that the trial court's failure to consider alternative to incarceration may be harmless if the "alleged violation was a commission of a major crime or a crime similar to that for which the probationer was originally convicted. . . ." Abel, 574 S.W.2d at 417. See also id. at 419. But under the facts of Romano, as in Abel, alternatives to incarceration were certainly appropriate and Judge Whipple, therefore, committed prejudicial error by failing to consider them before deciding to revoke Romano's probation.

IV. THE DISTRICT COURT CORRECTLY DECIDED NOT TO HOLD AN EVIDENTIARY HEARING TO ALLOW THE MISSOURI TRIAL JUDGE TO SUPPLEMENT THE RECORD AND CURE THE CONSTITUTIONAL ERRORS IN HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Judge Whipple filed detailed findings of fact and conclusions of law, D.R. at 66-67, as required under Gagnon. 411 U.S. at 786. "The purpose of the written statement is to allow the reviewing court to determine whether there was a factual basis for revocation. . . ." Kartmann v. Parratt, 535 F.2d 450, 457-58 (8th Cir. 1976). Judge Whipple failed to give even the slightest attention to the question of whether alternatives to incarceration was a viable sentencing option for Romano. Thus, the district court and Eighth Circuit had little difficulty in concluding that Judge Whipple erred in his revocation decision.

Petitioners argue that the district court should have held an evidentiary hearing to determine if Judge Whipple mentally considered alternatives to incarceration before revoking Romano's probation. Pet. at 31. Petitioners cannot support this incredible argument with any authority. One of the most fundamental and axiomatic principles of appellate jurisdiction is that a trial judge may not supplement an extensive record to cure errors after he has relinquished jurisdiction over the case.

V. THE DISTRICT COURT AND THE EIGHTH CIRCUIT APPLIED THE CORRECT STANDARD OF REVIEW WHEN THEY HELD THAT THE MISSOURI TRIAL COURT "ABUSED ITS DISCRETION" IN REVOKING RESPONDENT'S PROBATION.

In Burns v. United States, 287 U.S. 216, 222-23 (1932), this Court held that an appellate court must apply an "abuse of discretion" standard in reviewing probation revocation decisions. In defining "abuse of discretion," this Court stated that judicial discretion "implies conscientious judgment, not arbitrary action . . . [and] takes account of the law and the particular circumstances of the case and 'is directed by the

reason and conscious of the judge to a just result.'" Id. (citation omitted). Morrissey and Gagnon gave the "abuse of discretion" standard of review constitutional content. The courts in Romano, 735 F.2d at 321, and Abel, 574 S.W.2d at 419, for example, have held that a trial court's failure to consider alternatives to incarceration before revoking probation is a due process violation, and, therefore, an abuse of discretion as a matter of law.

Even if one assumes that Judge Whipple had no constitutional duty to consider alternatives to incarceration before revoking Romano's probation, Romano should still be affirmed. Under the standard announced in Burns, it was arbitrary for Judge Whipple to revoke Romano's probation and impose a twenty year prison term as a result of a traffic accident which had no rational relationship to his underlying criminal offense of selling marijuana. If all judges revoked probation terms for any technical probation violation, the probation system could not survive.

Petitioners contend that the federal courts below erred in not applying a more deferential standard of review to the Missouri trial court's findings. Petitioners apparently have misunderstood the plain language of 28 U.S.C. §2254(d). The federal courts have no statutory obligation to defer to Judge Whipple's findings in the case at bar for two reasons:

1) Judge Whipple made no factual findings as to the viability of alternatives to incarceration before revoking Romano's probation. 28 U.S.C. §2254(d)(1), (2), (3), (6), and (8); and,

2) The question of whether Judge Whipple should have given Romano an alternative to incarceration is a question involving Romano's due process rights, concerning which no deference need be given to the state court's finding. 28 U.S.C. §2254(d)(7).

Finally, even if one were to consider the question of alternatives to incarceration a mixed question of law and fact, this Court has held that such questions may be reviewed independently under 28 U.S.C. §2254(d)(8). Sumner v. Mata, 455 U.S. 597, (1982).

VI "THE DISTRICT COURT AND EIGHTH CIRCUIT WERE CORRECT IN ORDERING RESPONDENT RELEASED FROM ALL FURTHER CUSTODY BY THE STATE OF MISSOURI.

After finding that Romano's probation revocation hearing was unconstitutional, the district court and Eighth Circuit were correct in ordering Romano's unconditional release from all further custody. If Judge Whipple's probation revocation order was unconstitutional, and, therefore, a nullity, Romano's five year probation term, which commenced on April 13, 1977, expired on April 13, 1982. The State of Missouri no longer has jurisdiction or custody over Romano's person to conduct a new revocation hearing. The courts below were, therefore, required to order his release.

Several state courts, addressing the precise remedial issue which the court below decided, have held that a state may not hold a new probation revocation hearing to cure a procedural defect in a former hearing after an individual's probation term has already expired. People v. Amsbary, 51 Cal. App. 3d 75 (1975); Maycock v. State, 281 So. 2d 64 (Fla. App. 1973); Cook v. Commonwealth, 176 S.E.2d 815 (Va. 1970); Strickland v. Melton, 165 S.E. 2d 90 (W.Va. 1968).

While the Missouri courts have never addressed the remedial question at issue, the applicable Missouri statutes also confirm that Romano must be released from custody upon the expiration of his probation term. Mo. Rev. Stat. §549.111.1 (1963, as amended 1967) (repealed by L. 1977, p.658, eff. Jan. 1, 1979), states that when a probationer has successfully completed his probation term, "[h]e shall automatically be absolutely

discharged from the probation and from the supervision of the Board of Probation and Parole . . . ." Romano successfully completed his probation term in jail. He must, therefore, be released as provided by Missouri law.

Petitioners continue to make the incredible argument that the courts below erred by considering the five and one-half years which Romano spent in jail as a result of his unconstitutional probation revocation. Pet. at 38. The Eighth Circuit and the district court refused "to blind [themselves] to the time Romano had served in the custody of the State of Missouri." Romano, 735 F.2d at 324. Moreover, as Judge Cahill observed, "the rigors and stress associated with imprisonment are far greater than those on probation." Romano, 567 F. Supp. at 887. This Court has also observed that an individual may serve his probation term in jail. Burns v. United States, 287 U.S. 216, 223 (1932).

The record reflects that the State of Missouri never made any criminal charges against Romano while he was incarcerated. To the contrary, the evidence of Romano's conduct in jail, if adduced, would reveal Romano's exemplary record as well as the pathetic history of his mistreatment by prison guards. Romano's five and one-half year jail term should, therefore, satisfy his probation requirement.

The district court also had alternative legal grounds which justified its decision to order Romano's release. Morrissey held that "[t]he revocation hearing must be tendered within a reasonable time after the parolee is taken into custody." 408 U.S. at 488.[20] In Johnson v. Holley, 528 F. 2d 116, 119 (7th Cir. 1975), the court held that a four month delay in

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[20] This Court has found that a probationer and parolee have identical due process libery interests. Gagnon, 411 U.S. at 782 n.3.

holding a parole revocation hearing is unreasonable, if not attributable to the petitioner. The court also held that such a delay is presumptively prejudicial, and, therefore, necessitates the parolee's discharge. Id.

Romano's probation violation occurred over seven and one-half years ago. It would be impractical and unfair to allow the State of Missouri an opportunity to conduct a retrospective hearing. The trial court can only fairly consider the question of alternatives to incarceration in the context of the fresh facts and mitigating circumstances surrounding the probation violation. A gross injustice would have resulted if the courts below had allowed the Missouri trial court to consider alternatives to incarceration for Romano in a historical vacuum.

Petitioners misrepresent the record when they suggest that Romano caused the delay in holding a timely (constitutional) revocation hearing. Pet. at 38. Romano, representing himself pro se in jail, filed his first motion for relief with the Missouri courts on March 28, 1980. Thus, the Missouri court had over two years in which to cure the errors in Romano's original probation revocation. But the record reflects that Romano was bounced around for years in the Missouri courts and that all of Romano's petitions for relief fell on deaf ears. See discussion at 3-5. Petitioners' concede that one Missouri judge, Cole County Circuit Judge James T. Riley, issued an order directing Romano to file a procedurally inappropriate post-conviction relief petition. Pet. at 7. This single mistake cost Romano almost three years of his life in the Missouri penitentiaries. Unbelievably, not a single Missouri court -- at the trial, appellate, or Supreme Court levels -- even once considered the merits of Romano's case.

The decision to release Romano reflected the lower courts' sound exercise of judicial discretion in pursuit of basic fair-

ness and justice. The ancient writ of habeas corpus exists to remedy the type of wrong to which a poor and helpless Jim Romano was subject. In Iasigi v. Van De Carr, 166 U.S. 391 (1897), cited by Romano, 735 F. 2d at 324, this Court noted that the federal courts may exercise "discretion" "as law and justice require" in deciding upon a proper habeas remedy. 166 U.S. at 393, 395. The current habeas statute embodies the same policies expressed in Iasigi. 28 U.S.C. §§2243, allows a federal court broad discretion in fashioning a remedy under a writ of habeas corpus. "[T]he Court shall . . . dispose of the matter as law and justice require." 28 U.S.C. §2243. Fortunately, after five and one-half years of unconstitutional imprisonment, and another one and one-half years of unconstitutional custody on parole, the writ of habeas corpus finally brought justice to Romano.

VII. THE EIGHTH CIRCUIT COURT'S OPINION HAS LITTLE PRECEDENTIAL VALUE AND, THEREFORE, DOES NOT MERIT THIS COURT'S REVIEW.

Romano presents an extraordinarily unique set of facts. Few individuals are ever likely to share Romano's experience. Thus, the case at bar will have little precedential impact on future habeas petitioners.

The Eighth Circuit was also very careful to limit the precedential value of Romano. The court wisely noted that "determining what constitutes adequate consideration of alternatives to incarceration (requires) case-by-case analyses." Romano, 735 F.2d at 322.

Moreover, while the Eighth Circuit was fully briefed on the relevance of the Bearden case, it chose not to discuss Bearden, which, as we have shown above, is factually distinguishable and would not change the result in Romano. Even if members of this Court, however, think that Bearden conflicts with some of the Romano court's analysis, Romano, neverthe-

less, will have no precedential value vis-a-vis Bearden as Romano does not even contain a citation of Bearden.

The Eighth Circuit also carefully discussed in very general terms the propriety of the district court's remedy releasing Romano from all further custody. Romano, 735 F.2d at 324. Romano presented in his appellate brief, and at his oral argument before the Eighth Circuit, the full legal justifications supporting the district court's remedial order as discussed herein. But the Eighth Circuit decided to limit the precedential impact of Romano by not elaborating on all of the authorities which supported its decision.

Finally, this Court should consider Romano's plight within our criminal justice system. Romano has suffered enough. He has already been unfairly deprived of some of the best years of his life. Romano's horrible legal nightmare should not be protracted in the courts any longer.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals, No. 84-465, October Term, 1984.

Respectfully Submitted:

OF COUNSEL:

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APPENDIX A

Relevant Constitutional Provisons and Statutes:

Fourteenth Amendment of the United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254:

> State Custody; remedies in Federal courts
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .
>
> (b) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant

for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. §2243:

> The Court shall summarily hear and determine the facts, and dispose the matter as law and justice requires.

Mo.Rev.Stat. §549.111.1 (1963, as amended 1967) (repealed by L. 1977, p. 658, §1, eff. January 1, 1979):

> Absolute discharge of person on probation or parole -- citizenship restored -- order of discharge to indicate restoration of rights.
>
> 1. When a defendant who has been placed upon probation or parole for the term prescribed by the court, and the court granting the probation or parole is satisfied that the reformation of the defendant is complete and that he will not again violate the law, the court shall, by order of

record, grant his absolute discharge. When a defendant has completed the term of probation prescribed by the court, if the original order of probation has not been amended, modified, extended or revoked by the court, he shall automatically be absolutely discharged from the probation and from the supervision of the board of probation and parole and the court shall so note by order of record. The order operates as a complete satisfaction of the original judgment by which the fine or jail sentence or commitment to the state department of corrections was imposed or suspended.

Office-Supreme Court, U.S.
FILED
JAN 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-465

In the Supreme Court of the United States

OCTOBER TERM, 1984

DR. LEE ROY BLACK, Director of the Missouri Department of Corrections and Human Resources; DICK D. MOORE, Chairman, Missouri Board of Probation and Parole,
Petitioners,

VS.

NICHOLAS J. ROMANO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari Filed, August 30, 1984
Certiorari Granted, November 26, 1984

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

United States District Court,
Eastern District of Missouri

11/ 4/82 PETITION FOR WRIT OF HABEAS CORPUS W/EXHIBIT A & Suggestions in support w/Transcript of proceedings fld. (Docket No. 82-7803c(4))

DECLARATION IN SUPPORT of Request to Proceed in Forma Pauperis. fld. by petitioner. Leave to file in Forma Pauperis. Granted (ELF) MOTION for appointment of counsel and waiver of docket fee fld. by petitioner.

MOTION to be appointed as counsel in petition. w/exhibit L. fld. by Jordan B. Cherrick
MOTION to expedite Petition for Writ of Habeas Corpus. fld. by Petitioner.

11/9/82 Motions of 11/4/82 and file delivered to Judge Cahill.

11/10/82 ORDER (CSC) fld. Ordered that Jordan B. Cherrick be and is appointed to serve as atty and counsel to the petitioner. cc: parties. (copy of entire file forwarded to Mr. Cherrick)

12/28/82 MOTION for leave to file amended Habeas Corpus Petition. w/exhibit A. fld. by pltff. Leave Granted (CSC).

12/28/82 *AMENDED PETITION FOR WRIT OF HABEAS CORPUS.* w/exhibits A. & B. fld. by petitioner. Leave Granted (CSC).

1/21/83 ORDER (CSC) fld. That respondents shall within 30 days from date of this order show cause why an evidentiary hearing should not be held in this mattera and why petitioner should not be discharged from parole, respondents shall reply specifically to each allegation contained in the petition and file transcripts of any and all evidentiary hearings which may have been held in the Mo. courts on all other relevant documents. cc: parties. (copy of Petition for writ of habeas corpus; copy of amended petition for writ of habeas corpus also sent to Kristie Green). by cert. mail.

2/17/83 RESPONSE TO COURT ORDER TO SHOW CAUSE why a Writ of Habeas Corpus should not issue w/exhibits A. & B. fld. by defts.

1/18/83 Response of 1/17/83 and file delivered to Judge Cahill.

3/17/83 REPLY SUGGESTIONS - To Respondent's Suggestions Opposing Petitioner's Request For Habeas Corpus Relief, fld by Ptnr

3/17/83 MOTION - For Oral Argument, fld by the Ptnr (ref 3/24/83)

*3/25/83 HEARING SETTING (CSC) fld. Hearing in this matter is reset from March 31, 1983, to APRIL 14, 1983 at 10:00 a.m. cc: parties.

*3/24/83 LETTER to attys re: oral arguments granted. by court. (CSC).

4/14/83 HEARING RESETTING (CSC) fld. Cause reset for hearing at 10:00 a.m. on Friday, MAY 6, 1983. cc: parties.

5/ 6/83 HEARING RESETTING (CSC) fld. Cause is reset for hearing on MONDAY, JUNE 6, 1983 at 10:00 a.m. cc: parties.

6/ 6/83 PARTIES PRESENT FOR HEARING ON HABEAS CORPUS. Cause taken under advisement.

6/20/83 ORDER AND MEMORANDUM (CSC) fld. Ordered that Nicholas James Romano's petition for writ of habeas corpus is GRANTED. cc: parties.

6/23/83 MOTION to correct technical error in Memorandum Opinion of June 20, 1983. w/exhibits A. & B. fld. by petitioner. (ref 7-1-83)

6/27/83 Motion of 6/23/83 and file delivered to Judge Cahill.

6/29/83 MOTION to Stay Judgment fld. by respondents. (ref .....)

6/29/83 MOTION to Amend the Judgment, Vacate or set aside the judgment and grant an evidentiary hearing. w/sugg. in support. fld. by respondents. (ref 7-1-83)

7/ 1/83 ORDER (CSC)—Fld., In response to the motions to amend the Court's memo dated June 20, 1983, fld by all parties in this action, the Court hereby changes page 2 of the memorandum, beginning at line 14 which reads etc., The Court now inserts the following as substitute language. The previous language in the 6/20 memo was inadvertent but in no way impacted on the Court's substantive ruling in this habeas corpus case. Thus, all other portions of the 6/20 memo, including the Court's ruling, shall remain unchanged. cc: parties

6/30/83—Motions of 6/29/83 and entire file delivered to Judge Cahill.

7/21/83 NOTICE OF APPEAL fld. by resps-appellants. (inadvertently sent back to defts-appellants by cashier). cc: attys, Judge Cahill; Court reporter. USDC & USCA fees paid. 2 cert. copies Notice of Appeal; 2 copies Order & Memorandum fld 6/20/83; 2 cert. copies docket sheets forwarded USCA8 6/27/83.

7/26/83 NOTICE OF CROSS-APPEAL fld. by petitioner-appellant. cc: attys; Judge Cahill; Court re-

porter. USDC & USCA fees in forma pauperis. 2 cert. copies Notice of Cross-Appeal; 2 copies Order & Memorandum fld. 6/20/83; 2 copies Order fld 7/1/83; 2 cert. copies docket sheets forwarded USCA. 7/27/83.

7/27/83 PUBLISHED with West Publishing Co., Bureau of National Affairs and Lexis Opinion Collection Dept. Order and Memorandum fld. 6/20/83.

8/ 8/83 DESIGNATION OF RECORD fld. by appellants. Dr. Lee Roy Black et al

8/ 8/83 SUPPLEMENTAL DESIGNATION OF RECORD. fld. by appellee and Cross-appellant Nicholas James Romano.

8/12/83 One Certified & 2 copies of designated record, 1 volume transcript of proceedings in the Circuit Court of Laclede County, Mo. forwarded to USCA.

11/18/83 CJA-20 fld. original sent to A.O., Washington, D.C. in the amt. of $1,151.02 for Jordan Bernard Cherrick (CSC).

6/29/84 ORDER (USCA) fld. Petition of appellants/ cross appellees for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

7/10/84 JUDGMENT (USCA) fld. Ordered and adjudged that the judgment of the said District Court is affirmed in accordance with the opinion of this Court. cc: parties.

7/12/84 ORDER (USCA) fld. By the Court that appellee/cross-appellant shall recover the sum

of $100.80 for briefs from appellants/cross-appellees.

10/23/84 NOTICE of filing petition for certiorari. by Nicholas James Romano. fld.

10/23/84 NOTICE OF filing petition for certiorari by Lee Roy Black. fld.

12/11/84 FORWARDED TO USCA—one volume of transcript of proceedings in the Circuit Court of Laclede County, Mo. 26th Judicial Circuit, Div. II at Lebanon, Mo.

United States Court of Appeals
For the Eighth Circuit

1983

July 29 Docketed case No. 83-2001

July 29 Certified copies notice of cross appeal; docket entries; order; judgment rec'd from DC (1)

July 29 ORDER: Jordan B. Cherrick, St. Louis, appointed under CJA to represent appellant (pro rated with 83-2000) (2)

July 29 BRIEFING SCHEDULE: Aplnt/Cr. Aplee DR 8/8/83; Aplee/Cr. Aplnt DR 8/18/83; Clerk's Record 8/30/83 OR Apndx 9/12/83; Transcript 8/30/83; Brf. Aplnt Cr. Aplee (Black) 9/23/83; Brf. Aplee/Cr. Aplnt (Romano) 10/12/83 Reply Brf. Aplnt/Cr. Aplee (Black) 11/14/83; Reply Brf. Aplee/Cr. Aplnt (Romano) 11/28/83 w/ 2000

Aug. 2 APPEARANCE for appellant. (3) cg

Aug. 5	Received appellants/cr. appellee's designation of record.
Aug. 5	APPEARANCE for appellee. (4)
Aug. 8	Received supplemental designation of aplee./cr. aplnt. w/83-2000
Aug. 23	BRIEF APPELLANT/CR. APPELLEE: (Black) w/ser 8/22 (covers)
Sept. 7	MOTION for leave to file overlength brf. w/2000
Sept 8	ORDER: Appellant's cross-Appellee's motion for leave to file an overlength brief is granted. Said brief shall not exceed 65 pp. Appellant/ Cross Appellee's Reply brief shall not xceed 15 pp.
Sept. 21	BRIEF APPELLEES/CR. APPELLANTS w/ ser. 9/21 5 copies. w/83-2000. (ROMANO)
Sept. 29	TO SCREENING w/83-2000.
Oct. 24,	*REPLY BRIEF* Appellant/Cross Appellee (BLACK) w/ser. 10/20 7 copies. w/83-2000. rh.
Oct. 26	Aplee/cr. aplnt. additional citation of authority
Dec. 16	MOTION of aplnt. to Incur the Expense of Hiring a Court Reporter to Transcribe Oral Argument. w/2000
Dec. 28	ORDER: Aplee/cross appellant's motion for authorization to hire a court reporter for oral arg. in this Court is denied without prejudice to appellee/cross appellant's right to seek preparation of a transcript at a later date. w/2000

Dec. 29	Transferred to January session.
8/12/83	3 copies of D.R. & 1 volume of transcript of Laclede County w/2000
1984	
Jan. 12	ARGUED AND SUBMITTED to Judges Ross, J. R. Gibson and Bowman in St. Louis. Mr. John C. Reed for Black, et al.; Mr. Jordan B. Cherrick (appointed) for Ramano. Rebuttal by Mr. Reed. Recorded. w/83-2000.
May 31	OPINION BY BOWMAN, PUBLISHED. w/83-2000 pa
May 31	JUDGMENT: Judgment of the Dist. Ct. is hereby affirmed in accordance with the opinion of this Court. w/83-2000 pa.
June 12,	petition appellants/CROSS APPELLEES (BLACK & MOORE) w.service. w/2000.
June 13	BILL OF COSTS of appellee/cross-appellant w/service w/2000.
June 28,	ORDER: Petition of aplnts/cr. aplees for rehearing filed in this cause having been considered, is hereby denied. w/2000
July 9	MANDATE ISSUED w/2000.
July 11	ORDER: APPELLEE/CROSS-APPELLANT shall recover the sum of $100.80 for briefs from appellants/cross-appellees w/2000.
July 12	RECEIPT FOR MANDATE w/2000
Aug. 31	Romano's Motion for Leave to Incur the Expense of Hiring a Court Reporter to Transcribe Oral Arguments w/2000

Oct. 2	Appellant's Brief in Opposition to Petition for Writ of Cert. which was filed in Supreme Court
Oct. 11	ORDER: Appellee/cross-appellant's motion for preparation of a transcript is DENIED. w/2000
Oct. 15	NOTICE OF FILING of petition for writ of certiorari to Supreme Court as Case No. 84-465, dated August 30, 1984. (w/83-2000) cg
Oct. 15	NOTICE OF FILING of petition for writ of certiorari to Supreme Court as Case No. 84-5557, dated September 24, 1984. (w/83-2000) cg
Nov. 30	CERTIFIED COPY OF ORDER of Supreme Court denying certiorari in Case No. 84-5557, dated November 26, 1984. (w/83-2000) cg
Nov. 30	CERTIFIED COPY OF ORDER of Supreme Court granting certiorari in Case No. 84-465, dated November 26, 1984. (w/83-2000) cg

IN THE
CIRCUIT COURT OF LACLEDE COUNTY, MISSOURI
26TH JUDICIAL CIRCUIT, DIVISION II
AT LEBANON, MISSOURI

Case No. 2437

STATE OF MISSOURI,
Plaintiff,

vs.

NICHOLAS JAMES ROMANO,
Defendant.

TRANSCRIPT OF PROCEEDINGS

(August 9, 1977)

On Monday, the 15th day of November, 1976, the above-entitled cause came on regularly for hearing before the Honorable DEAN WHIPPLE, at Lebanon, Missouri, with defendant present. The State of Missouri was represented by Mr. Earl F. Seitz, Assistant Prosecuting Attorney and defendant appeared in person and was represented by Mr. Jim Baldwin and Mr. Patrick Eng.

* * *

COURT: Court will call Case number 2437, State of Missouri versus Nicholas James Romano. Are you Nicholas James Romano?

ROMANO: Yes, sir.

COURT: You're represented here by Mr. Eng and Mr. Baldwin, is that correct?

ROMANO: Yes, sir.

[2] COURT: I don't believe the defendant's been arraigned in this county.

BALDWIN: We appeared down here in May, Your Honor.

COURT: Wait a minute, excuse me.

BALDWIN: This past May. Now whether or not. I don't recall whether there was arraignment or not.

COURT: At this time I would ask the State to read the Information to the defendant and advise him of the range of punishment on each count.

SEITZ: This Information is in the Circuit Court of Boone County, Missouri, State of Missouri versus Nicholas James Romano. There is two counts, alleged count one, transfer of a controlled substance; count two, sale of controlled substance. The case number from Boone County is 29, October '75, 100233. This was on a Change of Venue, here to this county. The Information is as follows: "Comes now, Earl F. Seitz, Assistant Prosecuting Attorney within and for the County of Boone, State of Missouri, and upon his official oath, informs the Court that NICHOLAS JAMES ROMANO on or about the tenth day of December, 1974 at said county, Boone, State of Missouri in count one did wilfully and unlawfully and feloniously, transfer a certain controlled substance to-wit, marijuana in an [3] amount more than 35 grams a Schedule I controlled substance as defined by the Revised Statutes of Missouri, 195.017 of 1969 and revised by Missouri Division of Health on September 28, 1974 to an individual. And, in count two, did wilfully and unlawfully and feloniously sell a certain controlled substance to-wit, marijuana, a Schedule I controlled substance as defined by Revised Statutes of Missouri 195.017, 1969, revised by the Missouri Division of Health on September 28, 1974 to an individual for and in consideration of lawful currency of the United States of America contrary to the forms that the statutes made in such cases

made and provided, and against the peace and dignity of the State." Signed, Earl F. Seitz, Assistant Prosecuting Attorney. "EARL F. SEITZ, Assistant Prosecuting Attorney, of Boone County, makes oath and states that the facts above and foregoing are true and correct according to his best information and belief." Signed, Earl F. Seitz. Mr. Romano, in both of those counts, the range of punishment is a minimum of five years to a maximum of life imprisonment in Missouri Department of Corrections.

COURT: Mr. Romano, you've heard the reading of the Information on the two counts in that Information. Do you understand what you're charged with in each count?

[4] ROMANO: Yes, sir.

COURT: Do you understand the range of punishment for each count in the Information?

ROMANO: Yes, sir.

COURT: Knowing the offenses with which you're charged and the range of punishment. Let's take first count one on count one, which is charging you with wilfully and feloniously transferring a certain controlled substance, to-wit, marijuana. How do you plead, guilty or not guilty?

ROMANO: Ah. . . guilty, Your Honor.

COURT: As to count two, you are charged with the wilfully, unlawfully, and feloniously selling a certain controlled substance, to-wit, marijuana. How do you plead to count two of the Information?

ROMANO: Guilty, Your Honor.

COURT: Before the Court can accept your plea of guilty on these two counts, it will be necessary for me to ask you several questions under oath. Would you raise your right hand to be sworn. Do you solemnly swear the

testimony you're about to give in this cause of action to be the truth, so help you God?

ROMANO: I do.

COURT: Would you have a seat in the witness chair, please.

[5] DIRECT EXAMINATION BY COURT

Q. Would you state your full name for the record? A. Nicholas James Romano.

Q. How old are you Mr. Romano? A. 28.

Q. Where do you reside at the present time? A. 910 Oak Place, Columbia, Missouri.

Q. Where are you employed? A. Ah . . . I'm employed with my stepfather and then I have ah . . . two other jobs at night. I work at two bars in Columbia, Missouri.

Q. What's the extent of your formal education? A. Ah . . . 12 years.

Q. Did you graduate from high school? A. Yes, sir.

Q. What's your other job? You said you have two. A. Well, my stepfather owns property in Columbia and I help him with the property.

Q. You mean rental property? A. Right.

Q. What do you do, help him with the maintenance work? A. Right.

Q. Are you married? A. No, sir.

Q. Have you ever been married? [6] A. No, sir.

Q. What's the condition of your physical health today, good or bad? A. Up to par, sir.

Q. What was the condition of your physical health on the date of these offenses, which was December the 10th, 1974? A. When this occurred?

Q. Wait, excuse me just a minute. This occurred on September 28, excuse me.

ENG: December the 10th.

Q. (Court) December 10th. The date in here is the revision date of the statute, all right. It's alleged to have occurred on December the 10th, 1974. What was the condition of your physical health on that date? A. Ah . . . well, I don't think it was up to par.

Q. Well, were you physically sick? Were you under a doctor's care? A. No, I wasn't physically sick. Mentally, I could have been a little ah . . . off balance.

Q. Well, were you suffering from a mental disease or defect on that date? A. Not that I know of. It's just ah . . .

Q. Well, whether or not you used good judgment is one thing. [7] A. That's what . . . that's what I'm trying to say.

Q. All right. But, have you ever been hospitalized for mental disease or defect? A. Well, after this happened, I ah . . . committed myself to a mental institute, institution in Columbia Mental Hospital.

Q. What was that, Mid-Missouri? A. Mid-Missouri Mental Health.

Q. Were you ever adjudged to be mentally incompetent in that institution? A. No, sir.

Q. Do you know of your own personal knowledge what were the results of the evaluation resulting during that hospitalization? A. Ah . . . I think they were positive as far as I know.

Q. Well, what does that mean? A. Well, they told me there was nothing wrong with me.

Q. All right. Now, in this Information is charged in both counts that you did each act, both in count one and count two wilfully. Do you understand that to mean that it was an intentional act on your part? The word wilfully means it was an intentional act. A. Yes, sir.

Q. You understand that? A. (Nods head)

[8] Q. Now the Information further in charges that you did unlawfully commit these two offenses. One of them of transferring possession of a controlled substance and of selling a controlled substance, do you understand unlawfully to mean it was against the law to do that? A. Yes, sir.

Q. To transfer or to sell the marijuana you had in your possession? A. Yes, sir.

Q. The Information further alleges in both counts that you did feloniously transfer. Do you understand feloniously to mean that the State of Missouri under statutory law admonishes you not to do this act, saying that it's wrongful? And it further say that if you are apprehended after committing this act that a punishment will be assessed upon you after you are found guilty or pled guilty. Do you understand that? A. Yes, sir.

Q. Now, tell me briefly what you did in each of these counts. First of all, let me ask you another. In both of these counts, the acts, alleged count one and two, did they take place at the same time? A. Ah . . . yes, sir.

Q. All right. Tell me what transpired? A. Well, the State sent an informer around to my house and [9] introduced me to the narcotic, opium and got me . . . well, they introduced me to it and I from and . . . after I was introduced to it, they ah . . . lured me into their trailer and asked me to make a trade with them, marijuana for opium. And ah . . . that's more or less what happened.

Q. You say into the trailer, you mean where they lived? A. Yes. The State was paying rent on this trailer in Columbia and they were distributing drugs out of this trailer. They weren't . . . they were having another person do this for them while they witnessed it.

Q. Did you know the man that you say you dealt with to make the trade for the marijuana? A. Well, he was a narcotics agent and it was hired from St. Charles, Missouri.

Q. Now, what do you mean that he introduced you to opium? What do you mean by that? A. Well, they sent around an informer and the informer had brought the drug to my house on two occasions.

Q. Now, is the informer the same one that you say is the narcotics agent? A. No, the informer is ah . . . is the guinea pig that they get to work for them and after . . . after they introduced me to it, then I was lured to the narcotics agent.

Q. How long before you made this trade that this informer [10] first come to your house? A. Probably two weeks before it took place.

Q. All right. Do you understand you are entitled to a jury trial on both of these counts, either jointly or separately? A. Yes, sir.

Q. Do you understand that by entering your plea of guilty that you will not have a jury trial, that this is your day in court on both of these charges and that what happens here today will finally dispose of it? A. Yes, sir.

Q. And do you waive your right to a jury trial on both of these offenses at this time? A. I do.

Q. Do you understand that if you had elected to have a jury trial, the State of Missouri would be required to bring forth witnesses to testify against you in your presence, in the presence of a jury to prove your guilt beyond a reasonable doubt? In other words, you have a right to face your accuser's, do you understand that? A. Yes, sir.

Q. Now, do you understand that by entering your plea of guilty, you are waiving your right to face your . . . an accuser to face your accuser? [11] A. Yes, sir.

Q. And do you waive that right at this time? A. Yes, sir.

Q. Now, do you further understand that by entering your plea of guilty, you are in fact admitting your guilt and waiving your right against self-incrimination? In other words, the right to remain silent, to not testify against yourself. That when you plead guilty, you are in fact, admitting your guilt and have been sitting here telling me your part in this wrongful act and this is the result of your waiving your right against self-incrimination. Do you understand that? A. Yes, sir.

Q. And do you waive that right at this time? A. Yes, sir.

Q. Now, do you further understand that if you had elected to have a jury trial, you would also have available to you the power of subpoena to subpoena persons to appear to testify in your behalf and to assist you in presenting a defense to the offenses alleged in this Information? Do you understand that? A. Yes, sir.

Q. Do you understand that you're waiving this because you have elected to plead guilty and to waive a jury trial? Do you understand that? [12] A. Yes, sir.

Q. Now, you're represented here by Mr. Patrick J. Eng and Mr. James E. Baldwin. Are you satisfied with their representation of you on this matter? A. I am.

Q. Have they done for you everything you've . . . that you've asked them to do in regards to this case? A. I am . . . I mean, yes, sir.

Q. Have they failed to do for you anything you've asked them to do to assist you in defending yourself in this case? A. No, sir.

Q. All right. Now, after we complete this questioning, there will be recommendations made to this Court,

possibly by your attorneys and by the Prosecuting Attorney concerning the punishment in this case. Now, do you understand that those are merely recommendations and that this Court is not bound by them? A. I do.

Q. Do you understand that it's this Court and this Court alone that will assess your punishment in this case? A. Yes, sir.

Q. Now, it's further my understanding that there's going to be a request which will be granted for a presentence investigation. It may even be after that's back in [13] that further recommendations will be made either by the State or your attorney concerning punishment. But do you understand regardless of whether those recommendations are made today or at the time I read the presentence investigation report that they are merely recommendations and I'm not bound by them? Do you understand that? A. I do, sir.

Q. Have you been threatened or coerced in any manner by anyone to induce you to plead guilty here today? A. No, sir.

Q. Are you entering your plea of guilty for any reason other than the fact that you are guilty of the offenses charged? A. No, sir.

Q. Are you telling the Court at this time that your plea of guilty is entered into by you freely and voluntarily? A. Yes, sir.

Q. Now, have you understood the proceedings that have transpired here today to this point? A. I have.

Q. Now, do you further understand that a presentence investigation will be ordered, an investigation made by the Department of Probation and Parole and it will be [14] brought back before me after I've had . . . had it given to me and at that time sentence will be pronounced

upon you. And at that time I will determine whether or not you will be paroled or required to serve a sentence. Do you understand that? A. Yes, sir.

Q. So, except for that, we'll have everything done today except the final sentence and parole, if there's one granted. Do you understand that? A. Yes, sir.

Q. So that you and I understand what's transpiring here. I'm sure your attorneys have told you, but I wanted to make sure you had an understanding? A. Un huh.

Q. Does either attorney for this gentleman have any questions?

BALDWIN: I have no questions, Your Honor.

ENG: No, Your Honor.

COURT: You may step down, Mr. Romano. Now, gentlemen . . . Excuse me just a minute, Mr. Romano, after examining you under oath, the Court determines that your plea of guilty was entered into by you freely and voluntarily, both on count one and count two of the Information and the Court accepts your plea of guilty at this time. Now, am I not correct, gentlemen [15] that a presentence investigation is going to be requested?

BALDWIN: That is correct, Your Honor.

SEITZ: That's the State's understanding.

COURT: All right. Now, is it my understanding or was I incorrect that it's being left up to the Court, the range of punishment plus whether it's probation or parole or is the State going to make recommendation on the years of punishment?

SEITZ: The State is making recommendation on the punishment for each count and also recommendation as to whether probation . . .

COURT: All right, I'm going to wait and receive those at the time I have the presentence investigation in

my hand unless there is an objection on behalf of the State or the defendant?

BALDWIN: We have no objection, Your Honor.

SEITZ: No objection to that, sir.

COURT: So it may be that the State, I'm sure they have all the information they want available, but I want them to have available to them the presentence investigation reports too. So, with that I'm going to order Missouri Department of Probation and Parole to make a presentence investigation on you. I guess I'll just have them contact the Prosecutor's office or [16] Mr. Eng's office to get a hold of the defendant. Keep your attorney advised at all times of where he can get a hold of you, so when the probation officer wants to talk to you, well they'll know how to get a hold of you.

ROMANO: Okay.

COURT: Anything further to be . . . that needs to be done today?

ENG: Will you have any idea when this might transpire?

COURT: Do you have any idea how long it takes the Columbia office to get out presentences down here. We anticipate six weeks going through Columbia.

SEITZ: Mr. Romano, have you lived in Columbia all your life?

ROMANO: Yes, not . . . well, I lived in Colorado for three years and I was in the army for a year.

SEITZ: Judge, I'd guess six weeks.

COURT: Well, we could probably almost do it on Law Day. No, that's only a month isn't it?

BALDWIN: That's December. You won't be back here until . . .

COURT: Gentlemen, the other thing I know is when I get that report in, we'll try to agree upon a mutual

agreeable date, possibly we could do it on Law Day . . . [17] If not, we'll do it ah . . . some other time. Now, I'm wondering why, if it works out that way, we couldn't do it while . . . while I was in Moniteau County, which would be a heck of a lot closer.

ENG: I'd have no objection.

COURT: Come down just to California. Unless Mr. Baldwin wants to come up.

ENG: Mr. Baldwin doesn't want to.

COURT: Now, it may not even work out, I'm just suggesting it because it'll depend on when I get the report back then we'll see where I'm going to be when.

BALDWIN: You have more time up at Moniteau than you have down here, too.

COURT: May or may not. I won't on . . . I won't on Law Day, I can tell you that.

BALDWIN: I certainly have no objection to that Your Honor.

COURT: I don't guess we need all this on the record. Anything further in this case at this time?

BALDWIN: No, Your Honor.

COURT: All right. Presentence investigation will be ordered.

* * *

Thereafter on April 13th, 1977, the above entitled cause came on regularly for hearing before the [18] Honorable DEAN WHIPPLE, Judge of Division II of the 26th Judicial Circuit, at Lebanon. The following was held:

(Defendant's Exhibit 1 marked, being a psychological evaluation, 10/12/76, Nicholas James Romano, by Sheldon Silk, M. D.)

(Defendant's Exhibit 2 marked, being an affidavit signed by Peter Paul Clark.)

COURT: Court will call case number 2437, State of Missouri versus Nicholas James Romano. Gentlemen, heretofore on November 15, 1976, the defendant appeared here with his counsel and entered a plea of guilty and a presentence investigation was made, was ordered and it has been received and I believe copies have been available or have been read by defense counsel and State, is that correct?

ENG: Yes, Your Honor.

BALDWIN: That is correct.

SEITZ: That's correct.

COURT: All right, is there any further statement or proceedings on this matter before the Court pronounces sentence?

BALDWIN: On behalf of defendant, Your Honor, we would wish to present a small amount of ah . . . testimony with regard to the defendant's position and request for parole.

[19] COURT: All right. You may do so.

BALDWIN: Mr. Romano, would you stand and face the Court and raise your right hand to be sworn please.

(NICHOLAS JAMES ROMANO DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

ROMANO: I do.

COURT: Would you have a seat in the witness chair please.

BALDWIN: Your Honor, before we start interrogation of this witness, by agreement of counsel we would like to offer into evidence ah . . . Defendant's Exhibit One, which is a psychological evaluation rendered by Sheldon Silk, dated October 12, 1976. We further would introduce Defendant's Exhibit 2, which is an affidavit of Peter Paul Clark. Ah . . . Mr. Seitz, representing the State of Missouri

has been afforded the opportunity to inspect both of these Exhibits and it's my understanding that he has no objection to introduction of these documents into evidence at this time. Is that correct Mr. Seitz?

SEITZ: That is correct, Your Honor.

COURT: All right.

BALDWIN: So, at this time, we would offer Defendant's Exhibits 1 and 2.

COURT: Defendant's Exhibits 1 and 2 will be admitted.

[20] DIRECT EXAMINATION BY BALDWIN

Q. Would you state your name for the Court please? A. Nicholas James Romano.

Q. What is your age, Mr. Romano? A. 29.

Q. And what is your date of birth? A. April 4, 1948.

Q. You were just recently 29 then, is that correct? A. That's correct.

Q. I'd like to direct your attention Mr. Romano, to the 10th day of December of 1974 and ask you whether or not you were arrested on that date for the offenses before which you are charged in this Court? A. On December the 10th.

Q. Of 1974, is that correct? A. That's right.

Q. At the time of your arrest can you describe for the Court the type of employment which you had? A. I was working with my stepfather and mother in a cleaning business that my stepfather owned.

Q. For how long had you been so employed? A. Approximately two years. 3 . . . 2, 3 years.

Q. Now, after your arrest on these charges on December 10, 1974, can you described for the Court the type of employment that you had after that, from December 10th, [21] 1974 to the present time? A. Ah . . . after

this incident, I started working for a friend of mine at a bar in Columbia.

Q. Who is the friend? A. Mike Atkinson.

Q. What is the name of the bar? A. The Stein Club.

Q. How long have you worked at the Stein Club in Columbia? A. Approximately 9 months.

Q. What employment, if any, in addition to employment with the Stein Club have you had during this 28 month period? A. Just with my parents.

Q. All right. Describe for the Court the type of employment you have had with your parents? A. Well. I worked in the cleaners and after my stepfather sold out and retired, he bought real estate in Columbia and I worked with him in that?

Q. Can you describe for the Court what type of work you did with your stepfather in this ah . . . property business that he had? A. Well, we do maintenance mostly.

Q. What type of property is it that he owns? A. Ah . . . rental property.

Q. Are you at the present time still working with your stepfather? [22] A. Yes, I am, yes.

Q. And what is your particular function with regard to this property? A. Well, I just work with my parents?

Q. What type of work do you do? A. Maintenance.

Q. Repairing faucets and light bulbs and so on? A. Correct.

Q. Can you tell the Court whether or not you have any other employment other than your employment at the Stein Club and with your stepfather? A. None.

Q. Have you, since December 10, 1974 been employed as a bartender in any other establishment in Columbia? A. I worked for two other friends, but they're trying

to sell their bars, so I just decided to spend most of my time at . . . at the other bar.

Q. How long did you work for these two other friends? A. Approximately 6, 7 months.

Q. When is the last time that you worked for them? A. Oh, probably 3 . . . almost a month ago, three weeks to a month.

Q. Almost a month ago. Tell the Court the names of these friends? A. Mr. John Jones and Mr. Michael Eng.

[23] Q. And what was the name of the establishment which they owned? A. Gladstone Bar in Columbia.

Q. That's in Columbia? A. Yes.

Q. And so at the present time you're working for the Stein Club as a bartender and you're also employed by your stepfather in the management and operation of rental property in Columbia, is that correct? A. Right, right.

Q. Mr. Romano, since the 10th day of December, 1974, can you tell the Court whether or not you have been arrested on any charges of any kind? A. I ran a stop sign. I've had a stop sign violation.

Q. Is that the only arrest you've had since December 10, 1974? A. Yes.

Q. When did this arrest occur? A. Approximately 2 months ago, a month ago.

Q. You've had no arrest for a felony or any other misdemeanor since December the 10th, 1974, is that correct? A. None.

Q. Concerning your arrest record on the presentence investigation report that was filed, Mr. Romano, it [24] shows that on the 6th day of December of 1967, you were arrested for possession and charged and a fine of $50 plus

cost. Can you tell the Court what substance or what commodity it was that you were arrested for possession on? A. Oh, it was something that I found on the street. I'd parked my sister's car and ah . . . looked down, picked this bag up and ah . . . realized that it was nothing but waste, threw it back down and before I knew it there was a policeman arresting me for possession of mariquana.

Q. And that's what the charge was, possession of marijuana? A. Right.

Q. And that was in 1967? A. 60 . . . yeah.

Q. December the 6th of '67? You've not been convicted of any other offense related to drugs or possession or sale other than that one conviction of December 6th, 1967, is that correct? A. Correct.

Q. Can you describe for the Court what type of work you do, what your actual jobs are . . . ah . . . in your employment with the Stein Club? A. Bartender.

Q. And that's basically all you do is tend bar and mix [25] drinks, provide drinks to the waiter or waitresses? A. Well, we . . . we ah . . . check ID's at the door at times. Ah . . . we clean up, just whatever needs to be done.

Q. I see. Approximately how many hours a week do you work at the Stein Club? A. I would say 35, usually.

Q. And what hour rate of pay do you receive for your work there? A. $3.25 an hour.

Q. Is that the same wage which you've received throughout the time of your employment there or has . . . have your wages increased since you started? A. They . . . they've increased.

Q. What figure did you start? A. I think around $2.50 an hour.

Q. All right. Approximately how many hours a week would you estimate you devote to work with your stepfather at the real property that he owns? A. I'd say roughly 25 hours, usually.

Q. With regard to the hearing that we are having today, Mr. Romano, you understand, do you not, that the purpose of this hearing is to assist the Court in sentencing you on the charges to which you've already pleaded guilty? A. Yes, sir.

Q. Now, if the Court would see fit to grant you probation in [26] this particular case. Can you tell the Court whether or not you feel that you can live up to the terms and condition of any probation that might be granted you? A. Oh, I feel that I could ah . . . I would like the chance to prove myself like I have over the last two and a half years since this incident happened.

Q. You are asking the Court then to grant you probation, to give you the opportunity to provide yourself a useful and worthwhile citizen, is that correct? A. If they would, yes.

Q. You may inquire.

CROSS-EXAMINATION BY SEITZ

Q. Mr. Romano, before you entered your plea of guilty, were you aware of what my recommendation was going to be? A. Ah . . . I had a pretty good idea of how you felt.

Q. Were you informed that I would be recommending 10 years in Missouri Department of Corrections and being opposed to probation? A. I felt that way.

Q. In other words, you knew that was going to be my recommendation? A. I had a good idea, yes.

Q. Now, these two incidents that you pled guilty to, is the presentence right or is it correct when it refers to [27] 26 pounds of marijuana? A. That's what it says, yes.

Q. Well, is that what it was? A. Yes.

Q. No further questions, Your Honor.

COURT: Anything further?

BALDWIN: No further questions, Your Honor. You may step down, Mr. Romano. Defendant would call Mr. Atkinson to the stand.

(MR ATKINSON DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

ATKINSON: I do.

COURT: Would you have a seat please.

DIRECT EXAMINATION BY BALDWIN

Q. Would you state your name to the Court please? A. Mike Atkinson.

Q. Where do you live, Mr. Atkinson? A. In Columbia, in Highland Park.

Q. What is your occupation? A. I own the Stein Club.

Q. Are you acquainted with the defendant in this case, Nicholas James Romano? A. I am.

Q. For approximately how long have you known him? A. Oh, probably for about 17 years or so.

Q. Can you describe for the Court what, if any, business [28] relationship you have with Mr. Romano? A. Well, he's worked for me for the past 9 or 10 months.

Q. And what ah . . . business capacity has he worked for you? What has he done for you? A. Ah . . . he works at the bar. He's the bartender.

Q. At the Stein Club, is that correct? A. Yeah, that's correct.

Q. With regard to the time that Mr. Romano has worked for you, can you describe for the Court what his duties are in fulfilling his job occupation? A. Well, it varies from night to night. Sometimes he may check ID's.

He may bartend, mainly bartends though, but they switch off.

Q. There are more than one employee working on a particular shift, is that correct? A. Oh yeah, yeah.

Q. Can you tell the Court whether you're personally present at most times during the operation of the business when it's open for business? A. Yes, I am, yes.

Q. Have you had the occasion to observe Mr. Romano in functioning or carrying out of his duties for you? A. Un huh, I do.

Q. Can you tell the Court, if you will, what type or what kind of employee you feel Mr. Romano is? [29] A. I feel that he does a real fine job.

Q. At what salary or wage do you start Mr. Romano? A. $2.50 per hour.

Q. And what is his present wage? A. $3.25 per hour.

Q. During the approximately 9 or 10 months that he has worked for you, do you have any records which you brought with you which would indicate the amount of income which you have paid him for this employment? A. Yeah, I do.

Q. Ah . . . can you refer to those records . . . records, and advise the Court as to the amount of income which Mr. Romano has earned as an employee of yours at the Stein Club? A. Well, I looked at them earlier and it's been about approximately $1,600.

Q. This would be for the year of 1976 or to date? A. Up to date.

Q. And this would be approximately $1,600 during this 9 to 10 month period? A. Right.

Q. Is that correct? A. That's correct.

Q. During the time that Mr. Romano has worked for you, can you tell the Court whether or not there were

any things [30] that you have observed about him or about the manner in which he conducts himself that has caused you any concern? A. No, ah . . . he does, you know, like I said, he does a good job, you know. He's . . . he's conscientious about his work and he's never been any problems.

Q. Do you feel that you would be in a position to give him a good recommendation if he sought employment elsewhere? A. Oh yeah, definitely.

Q. No further questions.

CROSS-EXAMINATION BY SEITZ

Q. You weren't present or aware of this transaction that occurred on December the 5th, 1974 were you? A. No.

Q. No further questions, Your Honor.

BALDWIN: One further question.

REDIRECT EXAMINATION BY BALDWIN

Q. Mr. Atkinson, you've described the operation as a bar. Can you tell the Court the type of clientele that serve . . . you serve in this bar? A. Well, it's . . . a lot of it's college crowd.

Q. Pardon me, go ahead? A. You know . . . they just you know, 21 probably to 30. You know, there's some local people.

[31] Q. What would you estimate the average age of your customers to be? A. Oh, 24 or 5 I would say.

Q. No further questions.

SEITZ: No recross, Your Honor.

COURT: Thank you, you may step down.

BALDWIN: Your Honor, the testimony that has been presented on behalf of the defendant with the two witnesses ah . . . testifying from the witness stand together with Defendant's Exhibit 1, being the psychological evalua-

tion rendered by Sheldon Silk, Defendant's Exhibit 2, being the affidavit of Mr. Clark, basically concludes the actual evidence that ah . . . defendant wishes to present at this time. However, we would like to make some additional comments ah . . . to the Court if it's appropriate at this time.

COURT: You may do so.

BALDWIN: The first thing that I'd like to point out to the Court is the fact that the defendant has just turned 29 years of age, that throughout the 28 months which has transpired since he was arrested and charged, the . . . the offenses which he's already entered a plea of guilty. He was a single man of relatively young age. The record will reflect that this is a first offense situation. He has no previous record of [32] any ah . . . felony convictions and I think this is important to point out to the Court. I think one thing which is extremely important for the Court to consider ah . . . in reaching it's decision concerning the sentencing of this defendant is the fact that since the time that he was arrested for these charges on the 10th of December of 1974, he has been totally ah . . . "clean" so to speak. He's had no conflicts, no trouble with the law, with the one exception of a minor traffic violation which he received approximately 2 months ago. Ah . . . when you couple the age of the defendant with the first offense situation plus the fact that he has proven to himself, to his attorneys, and I think to almost everyone else, he's been able to continue to remain at large as a free and contributing member of society for 28 months without any further scrapes with the law. We feel this makes a . . . a very strong argument for the fact that he is a worthy candidate for probation on this particular charge. Now, the . . . the State . . . I don't know exactly whether the Court's aware

of this or not, I assume that the Court is. But, Mr. Seitz has asked the defendant on cross-examination whether or not he was aware of the State's recommendation of 10 years on this particular charge. At this particular point in [33] time, we would like to call to the Court's attention the sentencing which has taken place on similar charges in Boone County from where this case came on Change of Venue. Ah . . . and all that we're asking this Court to consider is that be some uniformity of sentencing for a similar offense. Now, the presentence investigation report, which was filed in this case at the Court's direction, referes in a frequent number of occasions to an individual by the name of Jenny Wise. And if the Court will recall, the ah . . . presentence investigation report, Jenny Wise is named as the individual who made the telephone call to set up or to arrange this particular ah . . . incident, the sale in question here to which the defendant has already entered his plea of guilty. Jenny Wise was present at the time the sale took place. Jenny Wise was not charged with any offense, although she is the one that was present and actually made the telephone call to get the matter set up. Now, Jenny Wise was arrested in Boone County on a similar charge, not the same ones in question here, but on a similar charge. Jenny Wise who is the daughter of a doctor, who is ah . . . high on the staff at the University of Missouri Medical Center, received a five year sentence plus probation for the charge. And we think that certainly the defendant [34] in this case is entitled to the same kind of consideration even though his father is deceased and his stepfather is retired. Merely because he's not a doctor at the Medical Center at the University of Missouri, Columbia, this should not mean that he should serve time in the penitentiary for a . . . the same offense which she only got

five years and was permitted probation on, is free and at large at this time. The Court . . . I'm also quite certain ah . . . is aware of the fact that there was an attorney in Columbia, Missouri by the name of Head, who was charged with embezzling approximately $41,000 from an estate, which ah . . . he was working with at the time. In that particular situation, the attorney entered a plea of guilty to the charge, was given a sentence of five years and again was placed on probation. In that particular case, Your Honor, ah . . . there was a victim involved. There was an incompetent whose estate was depleted by $41,000, a victim, someone who was injured by the criminal act. In this particular case, there is no victim. There is no victim. And again we point out to the Court that since there is no victim, since there was no one actually, physically, or monetarily injured by the wrongs, which the defendant has admittedly perpetrated ah . . . we think that this also [35] goes a long way toward trying to point out to the Court what type of sentencing, what type of probation is granted in Boone County, the county in which this particular case arose. Now, the presentence investigation report, which admittedly does not recommend probation, the presentence ah . . . investigation report as prepared and signed by ah . . . Officer William R. Small is in my opinion replete with innuendos, with insinuations, with nothing to back up some of the statements that are contained in this particular report. Ah . . . for example, ah . . . he said the only people who had a kind remark to say about the defendant were his employers. The question becomes one in my mind of who did the investigating officer contact. He talks about marijuana being grown in Wright County in Hartville and insinuates that this defendant was the individual who was responsible for this. But, I . . . I call to

the Court's attention that there has been no arrest, no charge, no conviction whatsoever concerning any elicit drug traffic or marijuana growing conducted or perpetrated by this defendant. Ah . . . we feel that the only people that the probation officer talked with were more than likely representatives of the police department in Columbia, Missouri, ah . . . who admittedly were interested in this particular case because of the [36] fact that their unit is the one that actually made the arrest and ah . . . were responsible for bringing the defendant to trial. Ah . . . we're saying basically, Your Honor, that this report, we do not feel, is substantiated by any kind of fact whatsoever. It's surmised, it's conjecture, and it's based strictly on opinion. On the other hand, we would call the Court's attention to Defendant's Exhibit No. 1, which is the psychological evaluation, which was rendered Sheldon Silk. Mr. Silk has talked to this defendant. He has spent time with this defendant and he says that this defendant is a good candidate for probation and I submit to the Court that Sheldon Silk is a much more qualified individual to make a psychological or mental determination concerning the capabilities of this defendant then is the probation officer who completed and conducted this particular report. Throughout the report, reference is made to problems which this defendant has experienced in the past concerning authority figures. And ah . . . it's right there and I'm not trying to overemphasize that fact. Sheldon Silk even admits in his evaluation that yes, in the past the defendant has had some conflicts, some internal problem in ah . . . getting himself reconciled with authority figures. But, I submit to the Court that if this defendant has been out on bond and [37] been free to move about in society for 28 months and has not had any kind of

confrontation with the law on any kind of a serious offense other than running a stop sign, then I submit that I . . . that the problem, if any, which this defendant had concerning authority figures has certainly been resolved. And I would further say that if there is an authority figure problem, the thing to do is not put this individual behind bars somewhere where the only people that he can relate to are authority figures. I think that that in and of itself is self-defeating and I think that ah . . . the fact that the long period of time that's transpired without a problem certainly would show the Court that this defendant no longer has any kind of a problem as far as authority figures are concerned.

Now, finally the last thing that I would like to mention to the Court ah . . . is that I have personally known this defendant from the time he was about this tall. Coming from Columbia and that's the same place that Mr. Romano is from, ah . . . I've known him from the time he was just a young kid and based upon my personal knowledge of him, my personal knowledge of his background and his family situation, ah . . . I personally feel that he is also a good candidate for probation in this particular ah . . . matter. He's already admitted to [38] the Court that he is guilty of the offense with which he stands charged before the Court. He's asking the Court for the opportunity to prove to other people other than just himself that he can remain a member of society, be a good useful, worthwhile citizen in his community and I think he certainly has demonstrated that to himself as well as to all other individuals who have been in contact with him, because of the fact that for 28 months he has gone straight. He has had no problems with the law. And I think that of course this is something which the Court should take

into consideration and we would respectfully request the Court to take into consideration. Thank you, Your Honor.

ENG: Your Honor, before Mr. Seitz replies, can I make a brief, very brief statement? Ah . . . is . . . as the record will show, I've been the attorney for Mr. Romano the entire 28 months and I just wanted the . . . the Court to know that if it should consider probation for Mr. Romano that I would personally . . . I . . . I am in Columbia with . . . with him and I would personally make myself available to the Court, to probation, parole, and to Mr. Romano to assist him in any way to see that he helps make good on his probation, whatever the Court or probation and parole would require of him. Of course, assuming that the Court would go that way. And I've [39] known him also, Your Honor, for . . . since 1960, which is approximately 17 years and I concur with Mr. Baldwin that I also think he's the candidate for probation. Thank you.

COURT: Thank you Mr. Eng. Mr. Seitz.

SEITZ: If it please the Court. Your Honor, in this case the State's recommending a sentence of 10 years on each count to be imposed and be served in the Missouri Department of Corrections and to run concurrently. Ah . . . I think we've heard some good remarks here today, but I don't believe we should completely put aside what occurred back on December the 10th, 1974. Ah . . . reading the charge, we have a transfer of marijuana and sale of marijuana. The Court's aware of the pre-sentence and we weren't talking about a lid or a pound. We were talking about trading 25 pounds of marijuana for half an ounce of heroin. We're talking there in terms of three thousand-thirty-two hundred dollars. We're talking about a pound of marijuana that was sold for a hundred dollars.

Mr. Baldwin ah . . . pointed out two other cases and I think Mr. Baldwin would agree with me that in any jurisdiction in any case it's based on its own merits. You can't say, well this is the way one occurred and this is the way it should be done in all of those. For the Court's information, the cases involving heroin in Boone County [40] ah . . . the three in which I've penciled down here, the sentencing was 14 years, 15 years, 10 years. True, this is not a heroin case, but the Court's aware of the presentence and the whole thrust of the trade was to acquire it, a half an ounce of heroin. Ah . . . he also talked about the Wise case and the Head case. In the Wise case ah . . . the State in that case did recommend the penitentiary sentence of five years and was opposed to probation. She was placed on probation. It concerned a five pound transaction. Ah . . . for the Court's own information, we were much opposed to probation in that case, but she was granted it and that's the disgression of the Court and so be it.

In the Head case as he pointed out, there was restitution of like $43,000. Ah . . . this was not something that was as far as whether he went to the penitentiary or not. This was not something that was thought of and decided over night. Ah . . . the estate of the elderly lady was . . . had been declared incompetent, was conferred with as well as her sons and daughters. And they all agreed, as a matter of fact that statement was made in open court, that they requested the Court to place the individual on probation in the condition that he make full restitution. In that case I think justice was done.

[41] Today, I think justice will be done for the State of Missouri with a ten year sentence. Ah . . . if there's to be mercy, there's always times for that and that can

come later. But, right now I'm requesting that the Court impose a ten year sentence and order execution of that sentence. Thank you, Your Honor.

COURT: Anything further?

BALDWIN: Nothing further Your Honor, on behalf of the defendant.

COURT: Mr. Seitz, what's the full range of punishment on this offense?

SEITZ: The range of punishment, Your Honor, is a minimum of five years to a maximum of life imprisonment.

COURT: Mr. Baldwin, you asked the defendant some questions about this . . . December . . . this $50 fine and cost for possession. Do you know where that took place?

BALDWIN: The presentence investigation reports, Your Honor, shows that this information came from the records in Boone County and I would assume that that's the place where it occurred, in the Boone County Prosecuting Attorney's office.

ROMANO: There was no conviction on that. That was dismissed. This particular case.

BALDWIN: Where did it take place?

[42] ROMANO: Boone County.

COURT: Now this 12/6/67 possession substance unspecified, $50 and cost. Where was that? Isn't that the one . . .

BALDWIN: That's the one I asked about Your Honor.

ROMANO: This was in California.

BALDWIN: The state of California?

ROMANO: The state of California. See I misunderstood you, I thought you meant this one that was dismissed.

BALDWIN: So the one that you testified to . . . .

ENG: 11/23/73.

BALDWIN: Rather than 12/6/67, Your Honor. But this charge . . .

COURT: But what's this 6/8/72 possession, no disposition? Where did that take place?

BALDWIN: You have no recollection of that charge? Is that your statement?

ROMANO: No.

COURT: Well, now, which one . . . Mr. Romano, which one were you talking about that you said you were charged and paid a fine on, for picking up the packet and then dropping it?

ROMANO: In California, the first one, Your Honor.

COURT: All right.

[43] ROMANO: It was in Lagoona Beach. We were on the beach and we were asked to pay a fine and leave the state of California.

SEITZ: Your Honor, 6/8/72 was when Mr. Romano was arrested on ah . . . Broadway about 1:30 a.m. in the vicinity of his sister's car and was charged with possession of marijuana of less than 35 grams.

ENG: Okay, and you show no disposition of that since the 11/23/73 entry is the dismissal of that charge.

ENG: Okay.

BALDWIN: Good, okay.

ENG: So then those two are together. That's all one incident?

SEITZ: That's correct.

COURT: Mr. Romano, you want to retake the stand a minute please.

ROMANO: Yes, sir.

DIRECT EXAMINATION BY COURT

Q. Mr. Romano, in regards to this report I received from probation and parole office, in that report they indicate they talked with you and you made a certain state-

ment to them as to where you got this 26 pounds of marijuana. Now, where do you say you got it? A. Down on the Missouri River near Esley, Missouri.

[44] Q. And you found it growing wild down there? A. Next to the river.

Q. All right. Did you do any refining of it? A. Very little. I mean, of course we had to ah . . . had to refine it a little bit in order to deliver it as it was delivered.

Q. How was it delivered? A. In 1 pound packages.

Q. Did . . . did you weigh it out in packages in that manner? A. Yes, sir.

Q. Did you block it? A. No, sir.

Q. You don't know any thing about this marijuana patch near Hartsville, Missouri, wherever that is? A. No, sir. This is the first I've heard of that.

Q. Stay right where you are for just a minute.

COURT: Mr. Seitz, what's your information concerning the condition of this marijuana at the time the exchange was made?

SEITZ: In talking with the chemist, Your Honor, ah . . . Mr. Baxter, who run the analysis said it was what would be considered a higher grade and that the tetrahydrocanobonal content was sufficiently stronger than ah . . . he said home grown. And also he termed it as being manicured, which I understand is picking of the [45] leaves from the stems and . . . because the stems have no tetrahydrocanobonal in it.

COURT: Now, Mr. Romano, is this your testimony that you picked this marijuana and packaged it yourself?

A. Yes, sir.

Q. You didn't buy it from anyone already packaged? A. No, sir.

COURT: All right. Any questions by defense counsel as a result of the Court's questions?

ENG: Well, Your Honor, we . . . we would of course submit that the evidence entered in this case that was used in the preliminary hearing should speak for itself. Like, I don't know, Your Honor, probably hasn't seen it, but it was in 26 one pound or approximately thereof ah . . . bags, plastic bags, ziplocked tight bags and that's . . . there is no denial of that fact at all.

COURT: Okay. All right, you may step down, Mr. Romano, Mr. Romano, you want to approach the bench, please.

(Defendant approaches bench with his counsel)

COURT: Mr. Seitz, you may approach the bench. Mr. Romano, I've labored with this case for some time as I do with any case where there's a possibility of [46] sending somebody to the penitentiary. At this time I'm going to advise you that it is my intentions to assess punishment against you of 20 years in the penitentiary and place you on parole for a period of five years and probably extend that for another five years for a total of ten years on probation with very strict rules. And a violation of any one of those rules will cause that parole to be revoked and you sent to the penitentiary. Do you understand me?

ROMANO: Yes, sir.

COURT: Now, knowing that I'm asking you if you wish to stand on your plea of guilty or if you wish to withdraw your plea of guilty and stand trial.

ROMANO: I would like to stay with my plea of guilty and try to prove myself to you and the Court.

COURT: All right. Mr. Romano, I will advise you that on November 15, 1976, you appeared before this Court and entered your plea of guilty to count one and count two of an Information charging you, I believe with possession and transfer of marijuana, is that correct?

SEITZ: Sale and transfer.

COURT: Sale and transfer of marijuana. The Court at that time after examining you under oath determined that your plea of guilty was entered into by you [47] understandingly, knowingly, and voluntarily, and the Court accepted your plea of guilty and ordered a presentence investigation. Do you remember that?

ROMANO: Yes, sir.

COURT: Now, that presentence investigation, of course, has been returned. There's been testimony on it ah . . . by various individuals including yourself today. Now, you've been advised of what the Court's intentions are in this case. I'll first ask you, are you satisfied with the representation by your attorneys, Mr. Eng and Mr. Baldwin of you on this case?

ROMANO: Very much so, Your Honor.

COURT: Do you know of any legal reason why judgment and sentence should not be pronounced upon you at this time?

ROMANO: No, sir.

COURT: Allocution as to counts one and two. It is the judgment and sentence of this Court that the defendant be transported to the reception center of the Missouri Department of Corrections in Jefferson City, Missouri there to be kept and confined in an institution or institutions to be designated by said Missouri Department of Corrections for a period of 20 years unless sooner discharged according to law.

All right. That's your sentence on count one. On [48] count two, do you know of any legal reason why judgment and sentence should not be pronounced upon you on count two?

ROMANO: No, sir.

COURT: Allocution on count two. It is the judgment and sentence of this Court that the defendant be transported to the reception center of Missouri Department of Corrections in Jefferson City, Missouri there to be kept and confined in an institution or institutions to be designated by said Missouri Department of Corrections for a period of 20 years unless sooner discharged according to law. Said sentence to run consecutive with and not concurrent to the sentence pronounced on count one of this same file.

Now, Mr. Romano, I'm going to place you on probation under supervision of Missouri Department of Probation and Parole for a period of five years, because that's the maximum time I'm permitted to place you on probation on at any one time. And, I've cautioned you that you may consider having been on probation, an additional five years. That is not saying absolutely that I will do so. Now, the reason I have considered placing you on probation is because this is an offense you have committed in possessing and selling and not an offense against the body or person of another [49] individual, involving another individual. It appears you have an uphill run on this probation. First of all because the Department of Probation and Parole are not convinced you can make it and secondly, because your past track record is not too good.

Now, the express terms and conditions of your parole, are as stated in the report that you shall submit to a drug screen test on demand and at your expense at any time you're requested to do so by a probation and parole officer of the Missouri Department of Probation and Parole. That you be restricted, that you are restricted to the Boone County area unless you obtain prior permission from your probation and parole officer to leave Boone County, Missouri and that means even for a vacation.

ROMANO: Yes, sir.

COURT: Do you understand me?

ROMANO: Yes, sir.

COURT: Number three is that your person and property shall be subject to search at any time by any probation officer and also by any law enforcement officer of Boone County including members of the highway patrol. Do you understand that?

ROMANO: Yes, sir.

COURT: Now, Mr. Romano, if I get any report back [50] that you have refused any of these items I will consider it a violation of this parole. Do you understand me?

ROMANO: Yes, sir.

COURT: At that time, I will issue a warrant for your arrest and order you held without bond until we can have a parole revocation hearing and if at that hearing it is proven that you did refuse to do any of these prescribed items or any of the general rules and conditions of a parole that are prescribed by Missouri Department of Probation and Parole, then you can anticipate that I will terminate this parole and order you transported to the reception center of the Missouri Penitentiary in Jefferson City to serve 20 years, do you understand me?

ROMANO: Yes, sir.

COURT: Now, the reason for the sentence above . . . the recommendation, of course is that I'm placing you on parole plus the fact that I expect you to live up to the terms and conditions of the parole and I wanted you to be aware of the consequences if you did not. And do you understand what I consider the consequences to be if you do not?

ROMANO: I do.

COURT: Now, do you have any questions at all at [51] this time about this parole and probation?

ROMANO: No, sir.

COURT: Now, do you understand besides these specific points that I've spelled out that there will also be general terms and conditions of your parole gone over with you by your probation officer? The original intake officer is here today and you need to talk with him and of course he will transfer your paper work to Columbia.

The only other problem that's concerning me is . . . is ah . . . where you work, but I suppose I'll let the probation and parole people work that out with you. In other words, voluntary intoxication may lower your resistance to decide you might need to inbibe in the drug scene again. If it does, don't come and expect voluntary intoxication to be an excuse, because it will not be. Do you understand?

ROMANO: Yes, sir.

ENG: Your Honor, I think as a practical matter, it would probably be . . . since now he's a felon, he probably won't be able to work there either. We've been anticipating that, so he hasn't been counting on continuing his employment there.

COURT: Is that the normal rule in terms of conditional . . .

[52] ENG: The liquor commission will not allow him to work there. They'll close the place down.

COURT: Okay, I guess that's solves that problem for us, Mr. Romano. All right. Any questions to this point about what has transpired here on this case? If you got any apprehension, anything you need to clear with me, you better do it now.

ROMANO: Ah . . . on the similar case with the case they were talking about, Jenny Wise case, she was granted to work in a bar. If . . . if that's granted would that be all right with you?

COURT: It's all right with me if you can work it out with the Probation and Parole Board.

ROMANO: Okay.

COURT: But, it's at your risk.

ROMANO: Working there keeps me away from it.

COURT: I don't see how she can work there if the liquor control people say they'll shut it down, but that's not my problem.

ROMANO: They did do it though, and that's why I wanted to ask you the question about it because it did happen.

COURT: All right. When this probation officer goes over the terms and conditions of your parole, you better listen to him, because I think one of those [53] conditions is that you can't associate with other felons and that includes this Jenny Wise, because she is a convicted felon.

ROMANO: I understand.

COURT: And I don't know who some of your other associates are, but listen to those rules very carefully, because they're going to be the difference whether you become a resident of Boone County or a resident of Cole County in the penitentiary. Do you understand me?

ROMANO: I do.

COURT: Mr. Baldwin, do you have any questions?

BALDWIN: No questions.

COURT: Mr. Eng?

ENG: No questions.

COURT: All right. I'm taxing the cost of this action to you. You'll be given a reasonable time to pay them.

ROMANO: Thank you.

COURT: You may step aside to the parole officer.

(COURT RECESSED AT 3:02 P. M.)

(COURT RECONVENED AT 3:04 P. M.)

COURT: Mr. Romano, it was brought to my attention that I imposed those two sentences to run consecutive, which means one after the other and I did [54] not intend to do that. I intended to run them concurrent at the same time so that you will serve both sentences at the same time or a total of 20 years. Do you understand?

ROMANO: Yes.

COURT: The resentencing on that?

ROMANO: Yes.

COURT: And I will so make my docket entry to read that. Do you understand that?

ROMANO: Yes.

COURT: All right. I needed to call you back and advise you.

ROMANO: Thank you.

COURT: You may step aside again.

* * *

Thereafter on the 18th day of July, 1977, the above-entitled cause came on regular for hearing before the Honorable DEAN WHIPPLE, Judge of Division II of the 26th Judicial Circuit, at Lebanon. The State of Missouri was represented by Mr. Earl F. Seitz, Assistant Prosecuting Attorney of Boone County. The defendant was present in person and was represented by his attorneys, Mr. Patrick J. Eng and Mr. James E. Baldwin.

* * *

COURT: Gentlemen, Court will call case number [55] 2437, State of Missouri vs. Nicholas James Romano. This is a revocation hearing. Is the State ready to proceed?

SEITZ: The State's ready, Your Honor.

COURT: Is defense ready to proceed?

ENG: Ready to proceed, Your Honor.

COURT: Are there preliminary matters we need to take care of?

ENG: The only thing I have is a subpoena. I'd like to . . . state subpoena, but I wasn't sure whether they got him served.

COURT: All right. I'll show this subpoena filed. Before we start to take testimony on this case, I need to ask the defendant. You are Nicholas James Romano, is that correct?

ROMANO: Yes, sir.

COURT: And your represented by Mr. Eng and Mr. Baldwin, is that correct?

ROMANO: Yes, sir.

COURT: Mr. Eng, do you acknowledge at this time that you had a preliminary on this case and a written find of that hearing was served on your attorney? You may answer for him, Mr. Eng.

ENG: I acknowledge that, that one was held, yes sir.

[56] COURT: All right. Was there a written finding served and made available to you?

ENG: Yes, sir. We received a copy of it.

COURT: All right. Anything further we need to do before we start taking testimony?

BALDWIN: At this time Your Honor on behalf of the defendant we would request that all witnesses be excluded according to Supreme Court rule.

COURT: That would be permitted. At this time the rule for exclusion of witnesses is being invoked by the Court. Any individuals who have been subponaed to appear as witnesses or who anticipate appearing as witnesses must remove themselves from the courtroom and

stay outside the hearing of this case until they are called to testify and then again remove themselves unless they are finally discharged. So, if you have been subpoenaed or if you think you're going to be called to be a witness, please step aside at this time. We'd instruct the attorney to assist the Court in seeing that these witnesses stay outside of the hearing of the case.

All right. The State may proceed.

SEITZ: Call Mr. Bradley to the stand.

(MR. BRADLEY DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

BRADLEY: I do.

[57] DIRECT EXAMINATION BY SEITZ

Q. Would you state your full name for the Court please? A. Timothy Nesbeth Bradley.

Q. And where do you reside, sir? A. Ah . . . 205 College, Columbia, Missouri.

Q. Sir, if I could, I'd like to direct your attention to the 15th day of June, of this year ah . . . in the early morning hours and I'd ask where you were, sir? A. I was ah . . . working at the Stein Club.

Q. And did you remain at the Stein Club until it closed that evening? A. Yes, sir.

Q. After the Stein Club closed down, what did you then do, sir? A. Ah . . . I was standing outside ah . . . waiting around for my roommate to see what we were going to do after work.

Q. And did your roommate come up to you? A. Ah . . . he was sitting on the curb. I was talking to him.

Q. Were you by yourself or were there other people in the areas or . . . A. Oh yeah, there was a lot of people in the area.

Q. Now, that's ah . . . the Stein Club. For the Judge's information, would you tell him where that's located at?

[58] A. Ah . . . 7th and Broadway. Ah . . . it's on ah . . . I guess it'd be ah . . . front side is facing north and the back side is facing south. Ah . . .

Q. It's right in downtown? A. Yeah, it's down in the main, on Broadway, the main street.

Q. Then while you were waiting for your roommate, what were you doing sir? A. I was just setting there talking?

Q. Did you finally decide to leave or were you going to leave? A. Yes. We ah . . . nobody was going to do anything, so I said to my roommate, let's go home.

Q. What did you then do, sir? A. Ah . . . I turned around to my left.

Q. Now, where were you positioned ah . . . just before you decided you were going to leave? A. I . . . I was standing beside . . . in front of the Stein Club facing the front.

Q. Were you on the street or up on the sidewalk? A. I was in the street.

Q. Is . . . can you describe the parking there? What's it like? A. Ah . . . it's not parallel parking, it's diagonal like and then they got . . . it's a four lane street with diagonal [59] parking on both sides and our car was parked across the street from where I was and I had my back to our car.

Q. So then you started to leave? A. Un huh.

Q. Would that have meant you were going across the street? A. Yeah, I turned to my left and started walking across the street. It'd be north and ah . . . started saying good-bye to people.

Q. And then what was the next thing that happened? A. Ah . . . I saw two lights and woke up in the middle of the street.

Q. Did you . . . were you struck? A. Yes. Ah . . . I was hit by a car at least, you know, alls I saw was two head lights and then ah . . . then the next thing I woke up and people were, you know, running around screaming and stuff and I really didn't know what was going on cause I was, you know, knocked out and stuff, so I didn't know what happened.

Q. Were you able to see this car that hit you? A. Ah . . . I just saw . . . it . . . it was a streak. It was just two lights, cause I . . . I was caught off guard. I was facing the other way and ah . . . I turned, I saw two head lights and I . . . I guess I started to move out of the way, but it hit me. You know, so I didn't . . . I [60] didn't really get a look at anything, cause it came from my ah . . . left side and I was facing the right.

Q. Then what's the next thing that you remember, sir? A. Ah . . . waking up in the street and paramedics were working on me and ah . . . people were saying I got hit by a car.

Q. Then?

ENG: I object to that Your Honor as to what . . .

COURT: Overruled.

ENG: Hearsay.

COURT: Overruled.

Q. (By Seitz) And were you taken to the hospital, sir? A. Yes.

Q. Did you remember that? A. I remember ah . . . bits and pieces ah . . . I remember Terry Dehaven was sitting in the car . . . in the ambulance crying saying, you'll be all right. And I . . . next . . .

ENG: I'll object to anything that Terry Dehaven might have said, Your Honor.

COURT: What basis?

ENG: What basis?

COURT: On what basis?

ENG: On the basis that it's hearsay testimony.

COURT: Sustained.

A. (By Bradley) And ah . . . then I remember them doing like they [61] were casting my leg and then . . . then the part I remember was when they were stitching up my face and that was kind of painful, so I stayed awake for that. And ah . . . then about 8:30 they sent me up to a room and there was a detective sitting there asking me questions and it was . . . I just didn't really know what was going on. I was kind of in and out.

Q. What type of injuries did you sustain from this?

ENG: Your Honor, I'm going to object to that as being irrelevant.

COURT: I would permit some preliminary testimony. I don't want to go into it extensively.

Q. (By Seitz) Just what . . . briefly, what injuries? A. Broken leg, dislocated shoulder and some stitches.

Q. I have no further questions, Your Honor.

COURT: Thank you. You may cross-examine.

CROSS-EXAMINATION BY ENG

Q. Mr. Bradley, which . . . you have several roommates, do you not? A. Yes.

Q. Which one were you waiting for? A. Jack Nicholas.

Q. Okay. Does he work at the Stein Club too? A. Yes, he does.

Q. Was he working there that night? [62] A. Yes, he was.

Q. Were any of your other roommates there at the Stein that night? A. Ah . . . both of them were, I think. I'm not sure.

Q. Who are your other roommates? A. Craig Vogel and Greg Fallon.

Q. They both were there? A. Well, it was really crowded on Tuesday nights and I'm sure they were there. I can't remember if I saw them or not, because we were really busy.

Q. At the time just prior to your being struck ah . . . were you intoxicated? A. Ah . . . no, sir, I wasn't drunk. I had had a few drinks, but I wasn't drunk, because we were working.

Q. And you had had a few drinks. How many drinks had you had? A. I'd say ah . . . I had one bottle of Heineken and about two shots of Snobbs.

Q. Ah . . . where were you in the street at the time you were struck? A. When I was struck?

Q. Un huh. A. Ah . . . I was . . . I really just can't say, because ah . . . it happened so quick. I'd . . . some people say I was out further and some people say I was closer. I . . . I just [63] talked to him and I'd started walking and then I was like saying good-bye to people and the next thing I know I was . . . I got hit.

Q. Did this car hit you directly headon? A. No. It hit me . . . I was walking . . . I caught it out of my eye . . . the corner of my eye and I turned and then I got hit. I didn't . . . it happened so quick.

Q. Do you know if it knocked you away from where you were standing or whether it just knocked you straight up in the air or what? A. Well, I . . . from where they say I landed, it knocked me away or back in towards . . .

Q. You testified earlier that you landed in the middle of the street, is that correct? A. I never said that.

Q. Where did you land? A. Ah . . . right in front of the drugstore next to the Stein, they said, right next to the curb.

Q. Okay. A. I . . . I really couldn't tell you where I landed, cause I . . . I don't remember, you know. I was out and I don't know.

Q. Mr. Bradley, you don't have any idea who the driver of the car that struck you was, do you? A. No. No, sir. I didn't see anybody.

[64] ENG: That's all. Thank you.

SEITZ: Nothing on redirect, Your Honor.

COURT: All right. You may step down. Mr. Bradley you need to stay outside the courtroom.

BRADLEY: Okay.

COURT: Call your next witness.

SEITZ: Terry DeHaven.

(TERRY DEHAVEN DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

DEHAVEN: I do.

COURT: Would you have a seat in the witness chair, please.

DIRECT EXAMINATION BY SEITZ

Q. Would you state your full name for the Court please? A. Terry Willard DeHaven.

Q. Where do you reside, sir? A. Columbia, Missouri. Route 8.

Q. What is your occupation, sir? A. I work at the Stein Club as a bartender.

Q. If I could sir, I'd like to direct your attention to the 15th of June of this year. Did you work at the Stein Club on that date? A. I did, sir. From 9:00 that morning 'til 6:00 that night.

Q. Then after you had completed your hours or your work period there, what did you then do, sir? [65] A. I went to the other side of the bar and drank heavily all night long

Q. Now, did you remain there all night long? A. It was the later part of the night. I don't remember what time I left.

Q. Had you or did you see Mr. Romano in the bar that evening? A. I saw him in there that evening, yes.

Q. Was that after you were off work? A. Yes.

Q. Did you have a beer with him or two? A. Ah . . . I don't remember having a drink with him, but he was in there. I did see him.

Q. Now, when you got ready to leave, what did you do or where did you go? A. I went outside and ah . . . it wasn't time to close yet and I was outside by myself and I saw ah . . . Jim's car, what looked to be his car. It could have been someone else's. I was that drunk. I got in on the passenger side and passed out.

Q. Now, how did you know or how did you think this was Mr. Romano's car? A. It was a silver 240Z.

Q. Had you ever been in it before? A. He had given me rides home previous before that, after [66] working hours, cause he works out . . . lives out further past me on route B.

(State's Exhibit 1 marked, being a black and white photograph of a car.)

Q. Sir, I'm going to show you what's been marked State's Exhibit 1 and ask you to take a close look at it if you would. A. It looks like his car, yes.

Q. Is this State's Exhibit 1 . . . does that fairly and accurately depict the car that you got into that evening? A. Yes, from what I can remember.

Q. Other than the damage that you can now see on it? A. From what I can tell it looks like the car, yes sir.

Q. Okay. After you say you got into the car, did you leave the car or were . . . you say you passed out. Did you remain in the car? A. I did pass out. And

when I woke, I woke and the glass shattered and I had some glass on me and I got out of the passenger side and there was people running around screaming and hollering that someone was dead and I walked over to see the person and recognized it to be Monk, the guy that worked there and I'd worked with. And I stayed there with him from that time on and rode with him to the ambulance all the way to the [67] hospital.

Q. Is that Mr. Bradley, the person that previously testified? A. Correct.

Q. Now, do you know who was in the car with you? A. No, sir, I do not.

Q. But you were in the passenger side of the car? A. That's where I got out when I got out and everybody was running around in circles screaming and hollering somebody was dead.

Q. Now, where did this car go after you got out of it, sir? A. I have no idea. I was bent down with Monk holding his hand the whole time. I didn't even see it leave.

Q. Then I think you testified you went to the hospital with him? A. I did sir.

Q. Sir, after you arrived at the hospital, and a little while later, did you have a conversation with a Gary Saunders? A. No, I didn't.

Q. Did you talk to him at all at the hospital? A. I don't even remember seeing him. I don't think he was there, but I won't say for sure. I wasn't there long and the police came in and arrested me and took me down to the police station.

[68] Q. The next day did you talk to him at the hospital? A. Who's that?

Q. Gary Saunders. A. No.

Q. Are you telling me you never a conversation with him concerning this accident? A. Concerning this accident, no sir. I have not talked to him.

Q. No further questions, Your Honor.

COURT: Thank you.

CROSS-EXAMINATION BY ENG

Q. Mr. DeHaven, you said that the police arrested you? A. Yes, sir. They said I was under arrest for . . . I asked them what I was being arrested for and they said involuntary manslaughter, if I remember correctly.

Q. Did they . . . they had perceived that you were the driver of the car, is that . . . A. Evidently, they told me I was under arrest for involuntary manslaughter or something on that order.

Q. Un huh. And . . . A. They took me from the hospital to the station.

Q. All right. You ah . . . testified earlier that you were ah . . . you had been drinking heavily. A. Very heavily.

Q. That evening you . . . isn't it true that you were very, [69] very intoxicated, were you not? A. Very, very. You could ask any of the bartenders there. I was totally smashed.

Q. Even . . . even after the accident, you were still intoxicated weren't you A. Yeah.

Q. All right. That's all.

REDIRECT EXAMINATION BY SEITZ

Q. A couple of more questions if I might Your Honor. Mr. DeHaven were you driving this vehicle? A. No, sir. I was too drunk to drive anything.

Q. And are you telling me and the Court that you did not have a conversation with Mr. Saunders at the hospital? A. I don't remember seeing him there. I was so drunk I

could have talked to him, but I do not remember talking to him.

Q. And it's possible that you did talk to him? A. It is possible I could have talked to him. It is possible, but I do not remember.

Q. Is it also possible you might have told him who was driving the car? A. I don't know who was driving the car.

Q. In other words, you're saying you did not? A. I could have told him. I was so drunk, but if I would have I would not have any knowledge to it.

[70] Q. In other words, you might have told him who was driving the car? A. I could have, but I don't remember talking to him at the hospital because I was only there for a matter of minutes before the police got there.

Q. Is it possible that you told Mr. Saunders at the hospital that James Romano was driving the car? A. It could be possible. If it is, I do not remember it.

Q. No further questions, Your Honor.

ENG: No further questions.

COURT: All right. Mr. DeHaven, you need to remain outside the hearing of the case. Step outside the courtroom. Remain in the court house.

SEITZ: Mr. Saunders.

(MR. SAUNDERS DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

COURT: Step right up here Mr. Saunders and I'll ask you to raise your right hand and I'll swear you in. You may have a seat.

DIRECT EXAMINATION BY SEITZ

Q. Would you state your full name for the Court please? A. Gerald Raymond Saunders.

Q. And where do you reside, sir? A. Woodstock Trailer Court, Columbia, Missouri.

Q. And what is your occupation, sir? A. I work for Oldham Sausage out of Lee's Summit, Missouri. [71] Mr. Saunders, if I could, I'd like to direct your attention to June the 14th of this year at approximately 2:00 in the morning and I'd ask where you were, sir? A. I was standing in front of the Stein Club. I'd just walked out the door.

Q. And where were you standing on the curb of the street or . . . A. I was on the curb.

Q. What, if anything, attracted your attention sir? A. I saw a Datsun speeding down Broadway ah . . . it looked like it had swerved over the center line, went down made a U turn, came back up past the Stein Club, swerved into the parking area.

Q. And then what was the next thing you observed, sir? A. I saw ah . . . I didn't know who it was at the time, but the man had his back to me. I saw Monk or Timothy hit, thrown through the air, hit my car, landed on the sidewalk, and the Datsun swerved to a stop.

Q. Sir, I'm going to hand you what's been marked State's Exhibit 1 and I'd ask you to take a look at that if you would. A. Yes, sir, that's the car.

Q. Is this the car that you observed on the 15th? A. Yes, sir.

Q. And that's the car that struck Mr. Bradley? A. Yes, sir.

[72] Q. Then after this vehicle struck Mr. Bradley, what did you then do, sir? A. I started over towards the car and ah . . . a girl by the name of Jody climbed out of the driver's side and came back towards where he was laying on the sidewalk and I grabbed her and yelled for somebody to call the police and the ambulance and while I was holding her, the car took off across the street.

Q. Did you observe where the car went, sir? A. It went into, I believe the little parking area right across the street by the Farm and Home Savings or it was the County Court building in that parking area there.

Q. And is that the last place you saw it or . . . A. Yes, sir. Next time I looked up to see if it was there, it was gone.

Q. How . . . was this after this Miss Seificas got out of the car, did the car leave right then or . . . A. Just a matter of seconds.

Q. It just sped off? A. Yes, sir.

Q. Ah . . . did you see anybody else in the car, sir? A. Ah . . . I didn't see who was driving the car, no sir.

Q. Did you see anyone else in the vehicle, though? A. Ah . . . Terry DeHaven got out of the car?

Q. And which side did he get out of the car? [73] A. He got out of the . . . the right hand side, the passenger side.

Q. The passenger side. A. I think he went up to Mr. Bradley, yes sir.

Q. I have no further questions, Your Honor.

COURT: Cross-examination?

ENG: Yes, sir.

CROSS-EXAMINATION BY ENG

Q. Gary, you ah . . . testified that as soon as Miss Seificas got out of the car, you grabbed her, is that right? A. Yes. She . . . she was starting to walk back.

Q. She got out of the driver's side of the car, did she not? A. Yes, sir, she did.

Q. All right, and you got out and then grabbed and then you called the police? A. No, I yelled for them to call the police and an ambulance.

Q. Okay. Ah . . . isn't it true that you grabbed her and roughed her up and thought that in a very emotional

scene that . . . that she had been driving the car, in fact, killed this Mr. Bradley? A. That is correct.

Q. And didn't you state to her, "You killed Monk. You killed Monk." [74] A. Ah . . . I don't remember saying that. It's possible I might have.

Q. So you at least . . . you thought she was driving the car at the time, didn't you? A. That is correct.

Q. Had you been . . . had you been working in the Stein Club that night or been there as a patron or . . . A. I had been working there.

Q. You had been working. Had you been drinking that night? A. I'd had a few beers, yes, sir.

Q. All right. Were you intoxicated? A. No, sir.

Q. Ah . . . ah . . . you're acquainted with Jim . . . the defendant here's brother, Eric Romano, are you not? A. Yes, sir.

Q. Ah . . . isn't it true that he also drives a Datsun 240Z? A. Yes, sir. Yes, sir.

Q. What . . . what color is that car? Is it a dark colored car? A. It's ah . . . I think it's a dark brown.

Q. Okay, ah . . . okay, ah . . . are you . . . I think in some of the police reports, you . . . you stated that you were aware that this silver Datsun was one that was commonly driven by the defendant, is that correct? A. I recognized the car, yes sir. Or the model make or . . .

[75] Q. Does . . . have you ever observed anybody else ah . . . drive that particular car? A. No, sir.

Q. You've never seen Jody Seificas driving that car? A. No, sir.

Q. Or Eric Romano? A. No, sir.

Q. How about Cathy Romano? Has she ever . . . did you ever see her drive it? A. Not that I can relate.

Q. Thank you, that's all.

SEITZ: A couple of more questions.

REDIRECT EXAMINATION BY SEITZ

Q. I think you've already testified as to the color of this Datsun, but would you . . . what color was this Datsun that you observed coming down the street? A. It was light in color. I wouldn't swear to the exact color.

Q. Now, Mr. Eng asked you at the time if you thought Miss Seificas was driving the car. Do you still think that, sir? A. Do I think that?

Q. Yeah. A. I . . .

BALDWIN: I'll object to this Your Honor. This [76] calls for speculation and conjecture. It's irrelevant and immaterial to the issues in the case.

COURT: Overruled. He may answer.

A. Do I think she was driving the car?

Q. (By Seitz) Yeah. A. No, I do not.

Q. And why don't you think she was driving the car?

ENG: Your Honor, I'm going to object.

SEITZ: Your Honor, I believe this was opened up by Mr. Eng.

ENG: How so?

COURT: Go ahead and state your objection.

ENG: I'm going to object. The objection is . . . it . . . it calls for speculation and conjecture on the part of this witness of he as to why he thinks somebody . . . it doesn't tend to prove or disprove any of the issue involved here in the court today.

COURT: Objection would be overruled. Gentlemen, this is a revocation hearing and under the procedure prescribed in *Moore v. Stamps*, this type of testimony is permissible and I will permit it.

Q. (By Seitz) You may answer. A. Okay. Could I have the question again. Why do I think that she was not driving or she was driving?

Q. Right. [77] A. Well ah . . . she told the police there . . .

ENG: Your Honor, I'm going to object to anything that Miss Seificas told as being hearsay ah . . . at this time.

COURT: Is Miss Seificas present to testify today?

ENG: Yes, she is.

COURT: Objection overruled.

Q. (By Seitz) What did she say, sir? A. She told the police that ah . . . Jim Romano was driving the car.

Q. And sir, did you later have a conversation with Mr. DeHaven in the hospital? A. Yes, I did.

Q. And did he tell you who was driving the car? A. Yes, sir.

Q. And who did he say was driving it? A. Jim Romano.

Q. No further questions, Your Honor.

COURT: You may cross-examine.

RECROSS-EXAMINATION BY ENG

Q. Mr. Saunders, are you testifying to the Court today that you actually heard Miss Seificas tell the policeman this or that you just know that for some reason or another? A. Ah . : . the police told me that she had made the statement that Jim was driving the car.

[78] Q. When did they tell you that, at what time? A. At the police station. She . . . they took a statement from her before they did me.

Q. But you didn't actually personally hear her tell anybody that the defendant was driving the car, did you? A. Ah . . . no, I can't say that.

Q. Okay.

COURT: All right, gentlemen, his testimony will be stricken as to this, because that would be double hearsay and I don't want to permit that. In reference, he . . . as

I understand his testimony was, he said the police told him that this Mrs. Seificas or Miss Seificas told them, so he's using double hearsay and I'm going to exclude that testimony.

SEITZ: In reference to her, I will agree Your Honor. However, it was . . . he talked directly with Mr. Saunders at the hospital.

COURT: All right. As to the police, yes, but as to Mr. Saunders that testimony may stand.

ENG: You mean Mr. DeHaven, Judge?

SEITZ: I mean Mr. DeHaven. Judge, I'm sorry.

COURT: Just a minute. Who did you talk to at the hospital?

SAUNDERS: Terry DeHaven. That's outside of the hospital.

[79] COURT: All right, as to Mr. DeHaven.

Q. (By Eng) And your statement is that Mr. DeHaven told you that it was his opinion that Jim was driving the car? A. That is true.

Q. Well, do you know how he knew that? A. I have no idea. He was in the car.

Q. But you . . . he didn't tell you that . . . exactly how he knew it, whether somebody told him or what, did he? A. No, he did not.

Q. He did . . . what was his . . . what was his exact words to you? A. I don't remember. We were out in front of the parking lot in front of the hospital and we were out there talking before we went in and he . . . he just said ah . . . why he told me I don't know.

Q. Is it possible that he could have said that ah . . . he just knew from other people telling him that Jim had driven the car? A. Are you asking my opinion? I. don't think so.

Q. Could it be possible? A. It is possible.

Q. That that is what he said? A. It is possible.

Q. Give me his exact words, Mr. DeHaven's to you as . . . as best you recall. [80] A. I can't give you exactly what he said. I can just tell you what I . . .

Q. You can't testify in Court then, today that . . . that he told you that he knew of his own personal knowledge that this defendant was driving the car whether . . . can you? A. I was under the impression that he was mad at the police and he wasn't saying anything because they were going to charge him with or threaten him with charges.

Q. But, just answer my question. You can't say that . . . A. He led me to believe that he knew who was driving the car, yes.

Q. But you can't say whether he told you that he knew of his own personal knowledge who was driving the car, can you? A. No, I can't.

Q. All right.

FURTHER REDIRECT EXAMINATION BY SEITZ

Q. If you can sir, can you recall basically what he told you concerning who was driving the car?

ENG: Your Honor, I object. I just asked him that and he said he couldn't. That's repetitious.

COURT: Overruled.

Q. (By Seitz) You may answer the question. A. Everything was such a mess that night. I can't really [81] say exactly what . . . what he . . . he told me.

Q. As near as you can recall, that's all we're asking for, sir. A. Well, hey, I don't know how to say this. All I know is that when I was standing out there talking to him, he told me that he was in the car and he told the police that he was too drunk to recall who was driving.

but he did tell me that Jim was driving the car. I don't even remember his exact words. I can't . . . I can't recall that.

Q. No further questions, Your Honor.

FURTHER RECROSS-EXAMINATION BY ENG

Q. But again, you don't whether or not he told you that he knew of his own personal knowledge, do you? A. Yes.

Q. Okay. That's all.

SEITZ: No further questions.

COURT: All right. Step aside. You need to remain outside the hearing of the courtroom.

SEITZ: Jody Seificas.

(JODY SEIFICAS DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

SEIFICAS: I do.

COURT: Would you take a seat please.

DIRECT EXAMINATION BY SEITZ

Q. Would you state your full name to the Court please? [82] A. Jody Lynn Seificas.

Q. And where do you reside, ma'am? A. 1012 Maplewood Drive.

Q. Do you know the defendant in this case, Mr. Romano? A. Yes.

Q. And how do you know Mr. Romano, ma'am? A. Ah . . . how do you mean that?

Q. Is he a real close friend? A. Yes.

Q. Dating him, is that what you would say? A. I'd say close friend.

Q. Now, if I could ma'am, I'd like to direct your attention to June the 15th of this year. Were you with Mr. Romano on that date? A. I refuse to answer that on the grounds that it may tend to incriminate me?

Q. In other words, you're taking your 5th Amendment right? A. Right.

Q. Were you with Mr. Romano at the Stein Club on that date? A. I refuse to answer that on the grounds that it may tend to incriminate me.

Q. How old are you ma'am? A. 19.

Q. Were you with Mr. Romano at the Stein Club when he closed up? [83] A. I refuse to answer that on the grounds that it may tend to incriminate me.

Q. Were you a passenger in Mr. Romano's car when it hit Timothy Bradley? A. I refuse to answer that on the grounds that it may tend to incriminate me.

Q. Did you talk to the police after this accident occurred? A. I refuse to answer this on the grounds that it may tend to incriminate me.

Q. More specifically, did you talk to officer Larry Wright concerning the facts of this accident? A. I refuse to answer that on the grounds that it may tend to incriminate me?

Q. Did you talk to Mr. Wright and isn't it true that you told Mr. Wright, Mr. Romano was driving the car? A. I refuse to answer that on the grounds that it may tend to incriminate me.

Q. Isn't it true that you told officer Wright on the night this occurred that you were a passenger in Mr. Romano's vehicle. A. I refuse to answer that on the grounds that it may tend to incriminate me.

Q. Isn't it also true that you told officer Wright that Terry DeHaven was a passenger in that vehicle when it struck Mr. Bradley? [84] A. I refuse to answer that on the grounds that it may tend to incriminate me.

Q. No further questions, Your Honor.

COURT: Cross-examination?

ENG: No questions.

COURT: Miss Seificas, stay outside the hearing of the courtroom until it's finally decided. I want to call a short recess and talk to the attorneys about this last witness.

(COURT RECESSED AT 10:32 A.M.)

(COURT RECONVENED AT 10:42 A.M.)

COURT: Call your next witness.

SEITZ: Officer Larry Wright.

(OFFICER LARRY WRIGHT DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

COURT: You may have a seat.

DIRECT EXAMINATION BY SEITZ

Q. Would you state your full name and occupation for the Court please? A. Larry F. Wright, police officer for the city of Columbia.

Q. How long have you been a police officer? A. A little over four and a half years.

Q. If you could sir, I'd like to direct your attention to the 15th day of June of this year in the early morning hours. Were you on duty on that date? A. I was.

[85] Q. At a little after 2:00, did you receive a radio dispatch? A. I did.

Q. After you received this dispatch, what did you proceed to do, sir? A. I proceeded to the Stein Club located on Broadway and Columbia, just east of 7th street.

Q. And after you arrived there, sir, what's the next thing that you did? A. I pulled up in front of the Stein Club and looked toward the curb line where I saw a white male lying next to the curb with a crowd of people standing around him.

ENG: Officer, can I ask that you speak . . . I can hardly hear you. Can I ask that you speak up just a bit.

Q. (By Seitz) Can you speak up just a little bit, Larry? A. Certainly.

Q. Then what did you do when you seen this person on the ground? A. I got out of the patrol car. I had a reserve officer riding with me, George Huge, who was trained by the fire department and ah . . . a little more involved emergency first aid than I am. He went to the victim and began to render aid before the ambulance got there and I began interviewing people who were standing around on [86] the sidewalk.

Q. Did you talk with a Jody Seificas? A. I did.

Q. And where was this at sir? A. I spoke with her right down by the corner of 7th and Broadway about oh, probably 100 feet down the street from the accident?

Q. How long was this after you had arrived that you talked with Miss Seificas? A. I would say in the neighborhood of 30 to 45 minutes.

Q. And did you ask her anything about the accident? A. I did.

Q. What did you ask her, sir? A. When I approached her, I asked her if her name . . . if her name was Jody and she said, "yes." I asked her here last name . . .

ENG: Your Honor, I'm going to object to anything that Miss Seificas said to this officer as being hearsay.

COURT: Objection would be overruled on the basis of *Moore vs. Stamps* in that hearsay evidence may be introduced at a revocation hearing where the witness is available to testify.

Q. (By Seitz) And then what did you do, sir? A. I asked her . . .

ENG: If I just might, Your Honor, for the record, [87] the witness is available for testimony, but she's taken the fifth Amendment and I believe the law is that if when she does that, it's the same as her being unavailable.

COURT: In any event, I'm going to permit objection to be overruled.

ENG: Okay.

COURT: I'm sorry, I . . . go ahead. Never mind, go ahead.

A. I asked her if her first name was Jody and she said, "yes." I asked her her last name and she told me. I then asked her if she had been riding.

ENG: Your Honor, I'd like the record to show that my objections will continue to this whole line of questioning for the record.

COURT: That would be permitted.

Q. (By Seitz) What was the next thing you asked her, sir? A. I asked her if she had been riding in the vehicle which struck the man that was laying out by the curb.

Q. Did she reply? A. Yes, she did. She said that she was.

Q. And what was the next thing that you asked her, sir. A. I then asked her who was driving the car and she said, "Jim." And I then asked her Jim Romana and she said, "yes."

[88] Q. Then what was the next thing you asked her, sir? A. I asked her if she would be willing to accompany me to the police station and give a written statement as to what had occurred.

Q. And she indicate she would do this? A. She stated she would go, but she wanted to speak to an attorney before she made any statement.

Q. Did you take her down to the police station? A. I did.

Q. And did she give you a written statement? A. No.

Q. What occurred after you arrived at the police station sir? A. When we got there, I asked her if she had a specific attorney she wanted to call and she stated, "yes." I asked who and she said, "Pa. Eng." I looked up the phone number in the directory for her and she called him.

Q. And did Mr. Eng come down to the police station? A. He did.

Q. And did he talk with Miss Seificas? A. He did.

Q. And then did you talk with Miss Seificas after he had talked with her? A. No, I did not.

[89] Q. Why . . . why did . . . did you try to? A. No. Mr. Eng came out of the room that was made available to him to speak with his client and when he came out he told me that she wouldn't answer any more questions or make any statement. I did not speak to her the rest of that night.

Q. Now, did you continue to investigating this hit and run accident, sir? A. I did.

Q. Did you ever . . . let me ask you this, did you locate what you thought might be a possible car that was involved? A. Yes, I did.

Q. And where did you locate that at, sir? A. On Park Avenue between 10th and 9th street.

Q. Approximately how far would that vehicle have been from where the accident had occurred, sir? A. About six blocks.

Q. And where was this thing? Was it setting on the street or just where was it located? A. It was parked clear back at the end of a driveway, which would put it about 45, 50 feet from the street.

Q. Sir, I'm going to show you what's been marked State's Exhibit One and ask you to look at that if you would please. Do you recognize State's Exhibit One, sir? [90] A. Yes, I do.

Q. What is State's Exhibit No. One, sir? A. It's a photo that I took on the police parking lot of the vehicle which we believe was the hit and run vehicle.

(State's Exhibit No. 2 marked, being an 8" by 10" photograph.)

ENG: Your Honor, could we approach the bench?

COURT: Yes.

(BENCH CONFERENCE NOT REPORTED)

Q. (By Seitz) Officer, when you located this car, ah . . . can you describe the car itself when you first came into contact with it? A. It was silver 280Z Datsun.

Q. Was it . . . did it appear that there had been any attempt, if any, made to conceal it? A. Yes.

BALDWIN: Your Honor, we can't hear the witness.

COURT: All right. You need to . . .

WRIGHT: I'm sorry.

COURT: Excuse me just a minute. Would you ask them to hold it down or ask them to go down in the downstairs lobby and wait. Thank you.

Q. (By Seitz) If you'd answer just loud, sir? A. Right.

ENG: Would you restate the question?

Q. (By Seitz) When you first found the car, was there [91] anything that didn't belong to the car there? A. Yes, there was.

Q. And what was that, sir? A. It was a large piece of . . . I'm not sure if it was carpeting or the . . . the layer that goes underneath. The carpeting had been placed across the front windshield of the car completely covering it from side to side.

Q. Sir, I'm going to hand you what's been marked State's Exhibit Two and I'd ask you to look at that and what is State's Exhibit Two, sir? A. This shows the car

with the front windshield covered up with the carpeting as I found it parked next to the house on Park Avenue.

Q. I have no further questions, Your Honor.

COURT: Cross-examination?

CROSS-EXAMINATION BY ENG

Q. Officer Wright, are you testifying in Court today that you found this car? A. I was advised of its location by my shift sergeant and he did not touch or approach the car until my arrival.

Q. How do you know that? A. Because he told me he didn't.

Q. All right. Officer, how many people approximately, were around the scene of this accident when you first [92] observed it? A. I would say there were anywhere from eight to twelve standing around on the sidewalk.

Q. Did you interview all of them? A. No, I did not.

Q. Other than . . . other than the testimony you just ah . . . gave about Miss Seificas, was anybody else there at the scene able to tell you who was driving the car? A. No.

Q. Would you tell me, Miss Seificas's exact words as you remember them as to the fact that the defendant was driving the car? A. I asked her if she had . . . had been riding in the car, which struck Jim Bradley and she said, "yes." I asked her if she knew who was driving the car and she said, "yes." I said "who," and she said, "Jim." I said, "Jim Romano," and she looked at me and said, "yes."

Q. You're absolutely possible that's . . . I mean, you're absolutely positive that that's the way it went? A. To the best of my . . . to the best of my memory, yes.

Q. It could . . . could your memory be wrong about those exact words? Is it possible? A. It's possible it

could be wrong about the exact phrasing. It's . . . I'm absolutely certain that she told me James . . . Jim Romano was driving the car.

[93] Q. Excuse me a minute. Officer, isn't it true that . . . isn't it true that you asked Miss Seificas not to . . . or for a statement and she said that she didn't . . . didn't . . . wasn't going to give the statement? A. I asked her if she would come down to the police department and give a statement, a written statement as to what happened?

Q. If she'd already given a statement to you, why did you feel that she needed to come down to the police station and give it again? A. It was just a matter of routine that we follow in any instance where we have witnesses.

Q. Isn't it true that she . . . she said she didn't want to give a statement until she could see a lawyer? A. That's right.

Q. And then at that time you said, you giving a statement . . . "you not giving a statement is not going to help Slick." Did you say those words to her? A. Not that I recall.

Q. Is it possible that you did? A. I don't think I told her at that time that her not giving a statement was going to help him, no.

Q. You don't remember then, making that statement to her "that you . . . you not making a statement isn't going to help Slick." You don't remember saying that? [94] A. I may have said that. I don't believe that I said it when I first talked to her there on the street.

Q. Do you remember that . . . that she made a response to you stating "Slick who?" And then you stated, "Slick Romano." And she said, "you mean, Jim Romano."

SEITZ: Your Honor, I would object to this line of cross-examination. We're having quotes from a wit-

ness here who has never even testified this information. He is questioning this man with . . . concerning what someone else said out of courtroom. I don't think that's proper cross-examination.

COURT: Objection overruled. I would permit it.

Q. (By Eng) Isn't that true? A. Would you repeat it.

Q. That . . . that she said to you, "you mean when you said Slick Romano" . . . Slick, she asked you, "you mean Slick . . . you mean." Or she said, "Slick who?" And you said, "Slick Romano," and she said, "you mean, Jim Romano." A. I may have called him Slick Romano, yes.

Q. All right. Through all of this could you have just thought that she had indicated that Jim Romano was driving the car through this conversation as I have just . . . just stated to you? A. No.

Q. That's not possible? [95] A. No.

Q. Why . . . Officer Wright, were you the one that arrested Terry DeHaven and charged indicating that you were charging him with manslaughter? A. To the best of my knowledge, Terry DeHaven was never arrested.

Q. Well, he just stated to Court earlier that he was arrested. A. He may have misunderstood the officer that picked him up over at the Med Center.

Q. Who was the officer that picked him up? A. I have no idea. I merely requested that he be brought to the police station if he could be located.

Q. All right. Officer Wright, didn't you . . . isn't it true that you told Jody Seificas that she would quite possibly and probably be arrested for manslaughter should this boy die? A. No, I did not. I said that if the prosecutor so desired, he coould prosecute her as an accessory

to a felony. I told her that it would be possible. I did not tell her it would be probable.

Q. Did you tell her about the charge of manslaughter though? A. I told her it could be manslaughter if the guy died, yes.

Q. Was that before or after she made the statement to you [96] that the alleged . . . the statement you claim she made to you? A. After.

Q. Was this ah . . . did you do this to prompt her to come down and give this written statement or give another statement? A. Not necessarily to prompt her. I just wanted her to know that it was a serious offense.

Q. Well, this was a threat by you, wasn't it, to get her to make statements about what had happened? A. No, it was not.

Q. Well, what was its purpose? A. Like I said, I just wanted her to know that a hit and run accident was a felony. I explained that to her.

Q. Isn't it true that at that time you . . . it . . . it was very possible that she could have been driving the car in your mind, isn't it? A. No.

Q. It wasn't? A. No.

Q. But hadn't Gary Saunders told you that ah . . . that he had . . . hadn't you heard about him grabbing Jody . . . Jody and stating that ah . . . she was the one that had killed Monk? A. No. Saunders never told me that.

[97] Q. Did you talk to Gary Saunders? A. I did.

Q. And what . . . What did Mr. Saunders say, if anything about Jody Seificas? A. He stated that after the accident occurred that the car first stopped there where the boy was struck and that Mrs. Seificas got out of the car and he said that at first when he saw her get

out, he thought that she had been driving and that he grabbed a hold of her, but he said that after the car pulled away and that looking back on the accident itself that it appeared to him that she'd gotten out of the back seat.

Q. That's all Your Honor.

COURT: Thank you. Redirect?

SEITZ: Just a couple of questions.

REDIRECT EXAMINATION BY SEITZ

Q. Mr. Wright, when you located the car, was this defendant Mr. Romano at the car? A. No, he was not.

Q. Was there anyone at the car? A. There was no one directly at the car, no.

Q. While you were there, did you observe anyone? A. I observed the gentlemen who runs . . . runs or owns the Stein Club that lives in that house where we found the car of the driveway and there was another [98] individual there with him and when I was approaching the car from the street they came out the front door and at about the same time someone ran out the back door out across the back yard.

Q. Did you check the back part of the house? A. Yes.

Q. What did you observe back there? A. We found a place where someone had run off through the grass and up the side of a small embankment.

Q. No further questions, Your Honor.

RECROSS-EXAMINATION BY ENG

Q. Officer, did you attempt to take any footprints or anything where you say somebody run off? A. It was kind of hard to get footprints off of grass.

Q. Did you check the path ah . . . A. Yes.

Q. All the way where it might lead? A. The area was checked. Back yards, front yards, sides of houses, and garages within a block and a half radius of where the car was found.

Q. For footprints and what not? A. For anybody.

Q. For anybody? A. Well, we were looking specifically for Mr. Romano.

Q. Yeah, but the next day did you check for footprints [99] anyway around back there that might tend to show that it was this defendant that was the person that ran back through the yard? A. No, I did not.

Q. Did anybody? A. Not that I know of.

Q. That's all.

COURT: Thank you.

SEITZ: No further questions.

ENG: I might want to recall this witness.

COURT: All right. Officer Wright, you need to stay outside the hearing of the case.

SEITZ: Mrs. Bradley.

(MRS. BRADLEY DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

COURT: Mr. Eng, to further clarify the objection awhile ago on the hearsay evidence. It's not the availability of the lady, *Moore vs. Stamps*, which also cites Gagnon Supreme Court case says as long as the probationer and his counsel are available to cross-examine the witnesses hearsay evidence is admissible in a revocation hearing. That's the basis of my ruling. Step forward ma'am. Thank you. Would you have a seat please.

DIRECT EXAMINATION BY SEITZ

Q. Would you state your full name for the Court please? [100] A. Mary Ann Bradley.

Q. And where do you reside ma'am? A. St. Louis.

Q. And what is your occupation ma'am? A. Day care center operator and owner.

Q. Now, a Mr. Timothy Bradley previously testified. What relationship is there between you and him? A. He's my son.

Q. If I could ma'am, I'd like to direct your attention to the 15th of June. Did you come to Columbia on that date? A. Yes.

Q. And where did you go after you came to Columbia? A. Directly to the University Medical Center.

Q. And after your arrival there, what did you do? A. Ah . . . we asked directions to Tim's room, and we tried to also look up possibly one or two of his doctors.

Q. And did you get to where they were keeping your son? A. Right.

Q. Approximately what time did you arrive there? A. We got the telephone call about 8:00. We left about 9:00, so we arrived there possibly about 11:00, between 11:00 and 12:00.

Q. Now, while you were in the hospital room with your son, [101] did Mr. Romano enter the room? A. Yes.

Q. Now, do you see Mr. Romano here today? A. Yes.

Q. Would you point him out for the Judge? A. Right there. (Indicating)

Q. And after he entered the room, did he have any conversation with anyone in the room? A. Yes, he more or less talked to Tim. I assume his comments were directed to Tim.

Q. And what did Mr. Romano say to Tim or Mr. Bradley? A. There were two statements that I remember and the one statement was, "I'm glad to see you're still talking," and the second statement was, that stands out in my mind, "it's too bad you jumped in front of me."

Q. Now, who else was present in the room then? A. Myself, my son, my two daughters, a nurse, ah . . . there was a young man in the next bed, and one of Tim's roommates.

Q. I have no further questions, Your Honor.

COURT: Thank you. Cross-examination?

CROSS-EXAMINATION BY ENG

Q. Mrs. Bradley, who was the other roommate that was present at the time? A. He's sitting right out in the hall with the blue and [102] beige shirt.

Q. What's his name? A. His last name is Fallon. He's from St. Louis, Webster Grove.

Q. Greg Fallon? A. Right.

Q. And he was present when these statements were allegedly made by the defendant? A. Yes.

Q. Okay. All right, Mrs. Bradley, are you absolutely sure that those were the exact words? A. Yes.

Q. It's not possible that he may have said, "too bad you jumped out in front of my car or too bad you jumped out in front of the car?" A. No.

Q. That's not possible. A. The way I heard it was, "it's too bad you jumped out in front of me."

Q. Mrs. Bradley ah . . . did you seek legal advice . . . legal counsel in regard to your son's personal injuries in this? A. Under these circumstances, yes.

Q. And ah . . . who did you seek legal counsel with? A. Mr. Oxenhandler.

[103] Q. Of the law firm of Tofle, Mack, & Oxenhandler in Columbia, Missouri? A. Right.

Q. And they now represent you in that . . . in that personal injury case? A. They do not represent me. They represent him.

Q. Okay. But, you went and saw them about it, didn't you? A. I saw who?

Q. The lawyer. A. Ah . . . under these circumstances which ah . . .

Q. Well, just answer my question. Didn't you . . .

SEITZ: Your Honor, I'll object to badgering the witness. She's trying to answer the question.

COURT: Sustained. Give her time to answer.

Q. (By Eng) All right. I'm sorry. A. Would you repeat that.

Q. I said but you went to see this lawyer, did you not? A. No, I did not go to see them. I placed a phone call and he came to the hospital the second day.

Q. What do you mean, placed a phone call? You called up this firm? A. Yes. My husband and I.

Q. Tell me how that went. Tell me how that went, then you called, your husband and you called up this particular law firm? [104] A. Right.

SEITZ: Your Honor, I'm going to object. I think true one can show perhaps biased or the credibility of a witness, but I don't believe . . . I think it's truly irrelevant to go into phone calls and everything like that. You can try to impeach a witness by saying did you not do this, but I don't think you can go to details Mr. Eng's going to.

COURT: What's the purpose of your question, Mr. Eng?

ENG: Just to show that the interest . . . that this witness has an ah . . . ah . . . perhaps the outcome of this and in a possible lawsuit in regards to the same facts are involved here today. It goes to the credibility.

COURT: I think it would be obvious on the record that the mother of the accident victim would be interested in the case and I don't see any other materiality. I'm going to sustain the objection.

ENG: All right.

Q. (By Eng) All right, now you testified at this defendant's preliminary hearing in Columbia, Missouri in

the Magistrate Court there in front of Judge Morgett about this incident, did you not? A. Yes.

Q. At that time ah . . . the witnesses were excluded from the [105] courtroom, isn't that correct? A. Correct.

Q. And you . . . where were you while you were waiting to testify? A. In a side room.

Q. Was your daughter in that side room with you? A. Yes.

Q. Did you discuss what your testimony and her testimony might be in that preliminary hearing with her prior to coming into the Court and testifying? A. At that date, yes, we talked about it.

Q. And isn't it true that you went over with her exactly what your story was going to be ah . . . as far as what the statements were? Isn't that correct? A. We both heard the same statements.

Q. But didn't . . . my question is, didn't you and her discuss exactly what you were going to testify in Court about? A. We assumed what the questions would be, yes.

Q. Do you remember the Judge admonishing you before you left, not to discuss the case with any other witnesses? A. I heard him say do not discuss the case. We always discuss the case.

Q. So, you did exactly what the Judge told you not to do? A. We discussed what we thought would be asked.

[106] Q. All right. That's . . . that's all.

COURT: Redirect?

SEITZ: No redirect, Your Honor.

COURT: Thank you Mrs. Bradley, you may step down. Remain outside the court house.

ENG: I might want to recall this witness.

COURT: Right. Call your next witness.

SEITZ: She's going to have her come in.

(COLLEEN HILBERT DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

DIRECT EXAMINATION BY SEITZ

Q. Would you state your full name for the Court please? A. Coleen N. Hilbert.

Q. How do you spell your last name? A. H-i-l-b-e-r-t.

Q. And . . .

ENG: Your Honor, in the interest of . . . I'll be willing to stipulate that this is the sister of the victim ah . . . that we've been discussing and that she was present in the hospital room with him on the date after the accident.

SEITZ: That's very fine with us, Your Honor.

COURT: All right. You may proceed.

Q. (By Seitz) When you were in the hospital room of your brother's, did this individual come in? A. Yes, he did.

[107] Q. And did he make any statements? A. Yes.

Q. Who did he . . . who did he talk to? A. My brother.

Q. And did you hear what he said to your brother? A. Yes.

Q. What did Mr. Romano say to your brother? A. Well, the first thing he said, he said when he came in, he says, "well, I'm glad to see you're still talking," and then he said, "too bad you had to jump out in front of me like that, it was a nightmare."

Q. I have no further questions, Your Honor.

COURT: Thank you. You may cross-examine.

CROSS-EXAMINATION BY ENG

Q. I forgot your last name? A. Hilbert.

Q. Miss Hilbert, ah . . . are you exact, are you positive that those were the exact words that were stated that day? A. Yes.

Q. Now, you testified in preliminary hearing in Columbia, Missouri about a week ago, did you not? A. Yes.

Q. Okay. And prior to that testimony the witnesses were excluded and you were in a room with your mother and [108] other witnesses before your testimony, were you not? A. Yes.

Q. Did you discuss with your mother what your testimony and her testimony would be in that preliminary hearing? A. Yes.

Q. And isn't it true that you sort of got your story straight as to what the exact words were, isn't that correct? A. No, that wasn't no.

Q. That's not true? A. I knew what I was going to say before I even got to Columbia.

Q. Un huh. Then why were you discussing it with your mother? A. We had been discussing it all along.

Q. Why did you feel the need to discuss it right before you went into court to testify? A. I didn't feel any.

Q. Do you remember the Judge admonishing you before you left after he swore you in, not to talk with any other witnesses ah . . . prior to your testimony in the courtroom that day? A. I couldn't hear everything he said.

Q. So, your testimony is that you didn't hear him say that, is that right? A. Hun uh.

[109] Q. You didn't hear him say that? A. (Shakes head) I was trying to listen to him.

Q. But you did discuss with your mother before your testimony about ah . . .what your testimony would be and she told . . . A. I said we've been discussing it all along.

Q. All right. And your testimony was that . . . Okay, let me ask you this, is it possible that the statement was, "too bad you . . . you had to jump out in front of my car." Is it possible? A. No.

Q. Was it possible the statement was, "too bad you had to jump out in front of the car." A. No.

Q. Who else was present in the room at the time this . . . these alleged statements were made? A. My mother, my father, my sister, myself, Timmy, Romano, and some other guy, I do not know who he is. Ah . . . it's . . . he's outside.

Q. Greg Fallon? A. Has he got blonde hair?

Q. I don't know. A. I think that's who it is.

Q. Ah . . . do you know him to be one of your brother's roommates? [110] A. Yes.

Q. Okay. That's all. Thank you.

REDIRECT EXAMINATION BY SEITZ

Q. Couple of further questions. In all these discussions concerning this with your mother, did the two of you decide to change any of what you thought you heard? A. No, not at all.

Q. And I think you've indicated that your father was in the room? A. Un huh.

Q. Does your father have a handicap, ma'am? A. Yes, he does.

Q. And what is that? A. He's legally blind.

Q. But he was present when these statements were made? A. Yes.

Q. No further questions.

ENG: I might want to recall the witness, but I have no further questions.

COURT: Thank you Mrs. Hilbert, you may step aside. You need to remain outside the hear . . . courtroom.

SEITZ: Would you have your father come in.

(MR. BRADLEY DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

COURT: Just have him go ahead and take the witness seat. Are you Mr. Bradley, is that correct?

[111] BRADLEY: Yes. Would you raise your right hand please. Thank you.

DIRECT EXAMINATION BY SEITZ

Q. Would you state your full name for the Court please. A. James F. Bradley.

Q. And what is your occupation, sir? A. Ah . . . at present time on total disability. And, my occupation before that, I was a group purchasing director for the Sister's of Mercy.

Q. And do you have a handicap, sir? A. My sight. I'm legally blind.

Q. Sir, if I could, I'd like to direct your attention to the 15th day of June. Were you and your son . . .

ENG: Your Honor, in the interest of saving time, I would enter the same stipulation.

Q. (By Seitz) Okay.

ENG: That he's the father of the victim, that he was in the hospital room at the time.

Q. (By Seitz) Were you in the room where your son was being kept at the hospital? A. Yes.

Q. And while you were there, sir, did any individual make any statements concerning the facts of the accident? A. Yes.

Q. Can you tell the Court what you heard, sir?

[112] BALDWIN: I object to that Your Honor until it can be identified as to who it was that made the statement.

COURT: You might ask further preliminary questions as to what was transpiring, what was related to him.

Q. (By Seitz) Well, you were aware of who was in the room? A. Yes, I was.

Q. And who was that sir? A. Well, may I say something before that?

COURT: Yes. You can give a complete answer. A. All right. It was stated that Mr. Romano was coming into the room.

ENG: Your Honor, I would object to anything . . . it was stated as being hearsay as to . . . we don't even know who said it.

COURT: Objection would be overruled as to the hearsay, have Mr. Bradley identify the parties you are referring to as making statements please.

A. My daughter came in the room. I know her voice and I can see her when she comes close and she said, "Mr. Romano is outside. He would like to come in and see you, is it all right?" And my son turned and said, "yes," but he informed the family, please do not say anything. So, whatever we heard was, . . . the room was completely in silence and it was not a bunch of people talking.

[113] Q. (By Seitz) Then did an individual enter the room? A. Yes.

Q. And did you hear this individual make any statements? A. Yes.

Q. And what did you hear him say? A. He said, "Glad to hear you talking." And then he said, "Why did you jump out in front of me," and at that time I turned to my wife and I said, "Did you hear what he said. I can't believe my ears."

Q. I have no further questions, Your Honor.

COURT: Thank you. You may cross-examine.

CROSS-EXAMINATION BY ENG

Q. Mr. Bradley, this statement that you say you heard is . . . why . . . "Why did you have to step out in front of me," is that what you said? A. "Why did you jump out in front of me."

Q. Okay. Not, "too bad you had to jump out in front of me." A. No, I don't think so.

Q. Okay. Mr. Bradley, how soon after the accident was it that you contacted an attorney with regard to your son's injuries? A. The . . . that afternoon.

Q. Before or after these statements were made? A. After the statements were made. I was concerned about [114] my son.

Q. Thank you. I have no further questions.

SEITZ: I have no redirect Your Honor.

COURT: All right. May this witness be excused or you want to hold him for recall?

ENG: No, I would finally excuse him.

COURT: All right. Mr. Seitz, do you desire to hold this witness for possible recall?

SEITZ: No, Your Honor.

COURT: Mr. Bradley, you are finally excused. You may remain in the courtroom if you desire or you may step out if you need to leave.

SEITZ: Chris Egbert.

(CHRIS EGBERT DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

(BENCH CONFERENCE)

ENG: If Mr. Seitz would indicate what he has to offer with this witness, I may stipulate to it.

SEITZ: This witness will testify, Your Honor, that ah . . . at the time the accident occurred until an hour after or an hour after Mr. Romano's arrest, there was

no one identifying this as . . . as James Romano calling the police station to report an accident.

ENG: I would stipulate to that.

COURT: Can you . . . can we identify the time of the apprehension and arrest of Mr. Romano?

[115] SEITZ: Yes.

COURT: When is that?

SEITZ: 12:55 the 15th. It occurred . . . the accident occurred about 2:00 July or June the 15th and he was apprehended in the hospital room on the 15th at 12:55. I believe was the time.

COURT: You mean just past noon?

ENG: The next day.

SEITZ: His testimony would be that he reviewed all the police reports for that time period and the law calls and he would also testify that it's standard procedure with Columbia Police Department that they take their phone calls as well as log them in. There was no one identifying themselves as Mr. Romano calling in to report an accident during that time span.

ENG: I don't know. There's no problem with that.

COURT: All right. For the Court's information, does he have information . . . does any . . . of anyone recording this accident that we're talking about? Anyone calling in to report it?

SEITZ: Other . . . none other than the call that was made responding . . .

COURT: No one possessing [professing] to be a driver or passenger of a car called?

SEITZ: No. There was no phone call to that effect.

[116] COURT: Can you all stipulate to that or you want to interrogate him as to that?

BALDWIN: Stipulate that to.

ENG: (Nods head) No problem.

COURT: All right.

(END OF BENCH CONFERENCE)

COURT: Now, can this witness be finally excused?

SEITZ: Yes.

ENG: Yes.

SEITZ: You're excused.

COURT: Sir, you're stipulated as to what you were going to testify to. You are finally excused. You may remain in the courtroom or you may step outside, whichever would be your desire.

SEITZ: I would recall Jody Seificas or whatever her name is.

COURT: Gentlemen, let's have a short recess before you talk to this witness.

(COURT RECESSED AT 11:22 A.M.)

(COURT RECONVENED AT 11:27 A.M.)

CONTINUED DIRECT EXAMINATION BY SEITZ

COURT: Mrs. Seificas, please remember you're still under oath.

SEIFICAS: Right.

Q. (By Seitz) Mrs. Seificas, you previously testified and an [117] officer testified to certain statements attributable to you. Now, I'm going to relate those to you. He's testified, you're under oath, that he talked with you the night of this accident and that you told him you were a passenger in the car. Do you admit or deny that? A. I admit that.

Q. He also testified that he talked to you.

COURT: Now, wait a minute. What'd she answer? I didn't hear your answer.

SEITZ: Would you read me the question.

A. Would you read the question?

COURT: Do you want it read or do you want it repeated?

A. I want it read. Can you play that back.

(LAST QUESTION AND ANSWER PLAYED TO THE COURT)

SEITZ: No more questions.

COURT: All right. Did you understand the question and the answer you gave?

SEIFICAS: Where you asked me if I was in the car?

SEITZ: Yes. No, I was asking you this ma'am. The question was, an officer today has testified under oath that he talked to you the night of the accident and that you made a certain statement that you were a passenger in the car and I asked you, do you admit that or deny that?

[118] SEIFICAS: Oh, I refuse to answer on the grounds that it may incriminate me.

SEITZ: He also indicated he talked to you that night while he was under oath testifying and he stated that you told him that James Romano was driving the car. Do you admit that you made that statement?

SEIFICAS: I refuse to answer that on the grounds that it may incriminate me.

SEITZ: Do you deny that you made that statement?

SEIFICAS: I refuse to answer that on the grounds that it may incriminate me.

SEITZ: No further questions, Your Honor.

ENG: I have no questions.

COURT: Just a minute Mrs. Seificas. Did you understand. I need you back on the witness stand. Did you understand the question we had read back to you?

Do you understand the question that you answered when you said yes?

SEIFICAS: No, I didn't understand.

COURT: But, what did you think you were answering?

SEIFICAS: I thought he was asking me if I was in the car?

COURT: He did.

SEIFICAS: He asked me if I was a passenger.

COURT: And what did you say?

[119] SEIFICAS: Well, I didn't . . . I mean, I didn't understand it until they read it back, if I was a passenger or if I was in it.

COURT: The question as I recall it was, Mr. Seitz advised you that a police officer testified here today that you told him the night of the accident that you were a passenger in the car. Did you understand that question?

SEIFICAS: Not the first time he asked it, no I did not. After it was read back I did.

COURT: All right. Mr. Seitz, what's your position whether or not she's waived the privilege by answering that question?

SEITZ: Your Honor, I researched the case on this and I feel that her answer to it, "I admit that," clearly waives her privilege and it opens up for questioning concerning her knowledge about this case.

FRANKLIN: Well, I might say a word about . . .

COURT: Would you identify yourself for the record.

FRANKLIN: My name is Charles Franklin. I practice law in Columbia, Missouri. My business address is on Broadway in Columbia. Ah . . . sir, the witness has told the Court that she did not understand the question. She did not understand the question until after the [120]

reporter was kind enough to read it back to her. I think there can be no waiver of the 5th Amendment privilege as under those circumstances. It wasn't clear. It wasn't clear to her what question she was answering as she so stated and she's not waived any privileges under the 5th.

SEITZ: If I might Your Honor. It appears to me that after a moment's thought ah . . . she indicated she did not understand the question, but also on the record here today, "I admit that." That's a pretty clear answer.

COURT: Mr. Baldwin.

BALDWIN: On behalf of defendant ah . . . I think it's the defendant's position in this case, an objection should be raised at this particular in time, ah . . . primarily to bolster the statement made by Mr. Franklin that a question was asked of the witness. The witness obviously and on the record did not understand the question. When the question was rephrased and repeated, a clear, concise, succinct answer to that question was given. And on behalf of the . . . the ah . . . defendant, we object at this time to ah . . . the Court's participation in this particular hearing in advising the State ah . . . or asking the State its position concerning whether or not any waiver of this particular witness' 5th [121] Amendment ah . . . rights ah . . . had been made. Now, this is clearly an adversary proceeding and ah . . . we feel that ah . . . the witness' statement . . . the rephrasing of the question . . . the very clear answer that was given ah . . . certainly does not warrant any waiver whatsoever of this particular witness' 5th Amendment rights. Again, in reference to . . .

SEITZ: Your Honor, I'm going to object to the defendant's attorney to this 5th Amendment. It's person to person only . . . only by defense counsel. Perhaps her attorney can object and counsel her, but it has nothing

to do with the other side. It's a right personal only to that individual, not to defendant's counsel.

FRANKLIN: Sir, I have no basis. I have no standing at all to object. I wish I could, but I can't. The only thing I can do is inform the Court that ah . . . my decision is that she has not waived her . . . her 5th Amendment privileges.

BALDWIN: To which we agree, Your Honor.

COURT: If anyone makes an objection as to the Court participating in the trial, it probably ought to be the State. I'm the one that wanted the question reread, but anyway, I don't think it's that material and probably alerted the defendant or excuse me, the [122] witness to the answer she gave. All right. You may step aside.

FRANKLIN: Sir, may I ask her if she's finally finished?

COURT: No, she's not. She cannot be finally excused. Call your next witness.

SEITZ: I have no futher evidence at this time.

COURT: Any evidence on behalf of defendant?

ENG: Yes.

COURT: Call your first witness.

ENG: Greg Fallon.

(GREG FALLON DULY SWORN BY CIRCUIT JUDGE, DEAN WHIPPLE)

COURT: You may have a seat in the witness chair right there.

DIRECT EXAMINATION BY ENG

Q. Would you state your name for the record, please? A. Greg Fallon.

Q. Okay. Where do you reside sir? A. 205 College Avenue.

Q. All right. Ah . . . who do you live with at 205 College? A. Ah . . . Jack Nicholas, Craig Vogel, ah . . . Monk used to live there.

Q. Monk is who? A. Tim Bradley.

Q. The person who was injured in the accident that we're [123] here about today, correct? A. Yeah, right.

Q. Ah . . . he was your roommate at the time of his injury? A. Yes.

Q. All right, ah . . . are you and he good friends? A. Who me and Tim?

Q. Yeah. A. Yeah, un huh.

Q. You work with him? A. Ah . . . never did that, no.

Q. You don't work with him? A. No, hun-uh.

Q. Oh. A. I was hired right after ah . . . he quit or he wasn't able to work anymore.

Q. After he was injured? A. Like I took over his job.

Q. You took . . . got a job at the Stein Club? A. Un huh.

Q. You now work there? A. Yes.

Q. All right. The next day after this ah . . . accident, did you have occasion to ah . . . be in Mr. Bradley's hospital room? A. Yes.

[124] Q. Ah . . . how many times were you there that day? A. Ah . . . I'm not really sure. I was probably there a couple of times. I was there in the morning about 1:30 and then I imagine I came back that afternoon. In fact . . .

Q. When you went in the morning, did you go by yourself? A. No, hun-uh.

Q. Who went with you? A. Jim Romano.

Q. The defendant? A. Yes.

Q. Okay. Ah . . . when you went in the afternoon, you went by yourself, didn't you? A. Yes.

Q. Jim Romano was arrested at . . . at the hospital room ah . . . when you went in the morning, wasn't he? A. Yeah, they came in the room.

Q. All right. Ah . . . were you present in the room in the hospital room, the entire time Jim Romano was in the hospital room with Tim Bradley? A. Yes.

Q. All right. Ah . . . you ah . . . do you recall any statement or was . . . did Mr. Romano and Mr. Bradley have a conversation? A. Ah . . . well, he said something about not . . . not being able to go to the lake, Tim not being able to go to the [125] lake that day, that week.

Q. Whose we said that? A. Ah . . . I said it and I guess Jim said it too.

Q. Un huh. Did . . . did you hear any other . . . who else was present in the room? A. There was ah . . . me and Jim, Mr. and Mrs. Bradley, Monk's two sisters, I think there was another patient in there too.

Q. Um huh. There was another patient in the rooom? A. In the bed next to him, I think. Pretty sure he was in there at that time.

Q. And do you know that person's name, of the patient? A. No.

Q. All right. Did you at any time hear Mr. Romano make any statements ah . . . to ah . . . ah . . . Mr. Bradley concerning the accident? A. No.

Q. All right. You were in the room the entire time, isn't that correct? A. Yes, un huh.

Q. At any time when you were in that room, did you ever hear Mr. . . . Mr. Jim Romano say. I'm . . . quote, "I'm glad to see you're still talking." And also, did you hear him say that? A. No.

[126] Q. Okay. Did you hear him say either, "Why did you jump out in front of me," or "Too bad you had to jump out in front of me." A. No, huh-uh.

Q. You didn't hear that? A. No.

Q. Did you . . . were you paying attention to what was going on in the room? A. Not really. I was kind

of just ah . . . checking Monk out. I couldn't believe he was there and ah . . . just went over shaking . . . remember shaking his hand and talking . . . saying he wouldn't be able to go skiing and the next thing I knew the officer came in, got Slick and then I turned around and they grabbed Jim and took him outside and started reading him his rights.

Q. At the time Mr. Romano had his conversation with Mr. Bradley, was anybody else talking in the room or having conversation? A. Yeah, I'd say so. I mean we were all . . . I was sort of . . . I was shaking Monk's hand giving . . . you know, I was just talking to him, "It looks like you're not going to be able to ski this weekend." You know, trying to cheer him up I guess. I was really just checking him out really. I couldn't believe he was laying there like that.

[127] Q. Did you say to ah . . . Jim in your conversation with him that you're glad to see that he's still talking, anything like that? A. I . . . I didn't say that, no.

Q. Did you say anything like that? A. I shook his hand.

SEITZ: Your Honor, I'll object. This is his witness here. I think we can ask him some questions.

COURT: Sustained. Rephrase your question.

Q. (By Eng) I have no further questions.

COURT: Thank you.

CROSS-EXAMINATION BY SEITZ

Q. I have just a couple of questions, sir. Mr. Eng asked you if you heard certain statements made by Mr. Romano. Would it have been possible that he might have made statements that you didn't hear? A. True.

Q. I have no further questions, Your Honor.

COURT: Redirect?

ENG: No redirect.

COURT: Thank you. You may step aside. May this witness be excused? You want to excuse this witness or hold him?

SEITZ: As far as I'm concerned he can be excused.

COURT: All right. Remain outside the hearing of the [128] courtroom. They may need you again. Call your next witness.

ENG: Excuse me, Your Honor, may I have just a brief moment?

COURT: Certainly.

ENG: We have no further evidence at this time, Your Honor.

COURT: All right.

SEITZ: Your Honor, I would offer State's Exhibit One and Two into evidence.

ENG: No objection.

COURT: Any closing statements? First by the State.

SEITZ: If I might, just might have a few moments, Your Honor.

COURT: All right. You mean you want a few moments before you make the statement?

SEITZ: No, just a few moments to make a statement to the Court.

COURT: All right. Proceed.

SEITZ. Your Honor, I'm not going to rehash the evidence which you've heard here today, because there's not a jury here. You're the best recaller of facts and evidence that were presented anyway.

I do feel though that we've more than complied with [129] the law in this area as to a clear showing that there has been a violation of probation here and that another

felony has been committed, and that is the felony of leaving the scene.

Ewing vs. Wyrick is a Missouri case, Supreme Court 1976, 535 S.W. 2nd 442, and I think they point out the law in this area and that is that a hearing Judge need ony be reasonably satisfied that the terms and probation have been violated. They don't talk about convictions in that case, they talk about . . . the evidence does not have to reach the level of a criminal trial that is beyond a reasonable doubt. They talk about reasonably satisfied and I think the evidence, what you've heard here today should definitely reasonably satisfy the Court that this individual has violated the terms and conditions of his probation to-wit, by committing another felony in that of leaving the scene. That's all I have Your Honor.

COURT: Thank you. Mr. Eng. Mr. Baldwin.

BALDWIN: May it please the Court, Your Honor.

COURT: Yes.

BALDWIN: Mr. Seitz, what we've heard here today is testimony on behalf of individuals who could or should have known something concerning the facts of this particular instance. The accident in which Mr. [130] Bradley was rather severely injured. I have Your Honor the actual substance of what we've heard here today, certainly goes or falls far short of giving in this Court any quantum of substantive evidence ah . . . to give the Court any basis for a reasonable ah . . . feeling that the defendant did violate his parole.

We start off with Mr. Bradley. He says that he saw a vehicle. He was hit in the middle of the road, came to in the middle of the road, had no idea who it was that was driving the vehicle, couldn't describe the car. Then you talk about Mr. DeHaven. He says that ah . . . he did

not have any idea who was driving the car. That it was a car in which he had been taken home several times by Jim Romano, but again there's been no direct ah . . . evidence showing that Mr. Romano drove the car. Mr. DeHaven even further testified that he had ah . . . been consuming intoxicating beverages on this occasion. He worked from 9:00 a.m. to 6:00 p.m. and then had quote, "gone to the other side of the bar and had ah . . . become smashed." He passed out in the vehicle while it was still apparently parked and was unable to say to anyone who was in the car when it was ah . . . being driven. Who was driving the vehicle. Ah . . . the only thing that the State and the Department of Probation and Parole are relying upon as far as trying to cause this [131] defendant's parole to be revoked are strictly hearsay statements.

Now, in chambers this morning the Court ah . . . and both attorneys for both sides are aware of the fact that hearsay evidence is admissible in this particular type of hearing. What I wish to say to the Court is that the only . . . the only evidence before this Court as to who was driving this particular vehicle on the 15th day of June, 1977 is nothing but hearsay evidence. The State is relying totally upon the testimony of officer Wright who said that Jody Seificas told him that Jim Romano, defendant in this case, was driving the car.

The Court or the State is also relying upon the testimony of Mr. Saunders who said that Terry DeHaven told him that Jim Romano was driving the car. Remember . . . the Court will very well remember, I'm sure, the testimony of Terry DeHaven who said he was drunk, was passed out. If he had said anything he didn't know it and he had no basis for having said it to begin with.

Now, the testimony that ah . . . the State also is relying upon quite heavily is the testimony of members

of the family of Timothy Bradley and the Court very likely pointed out that certainly it was possible that [132] ah . . . the mother, the father, the sister of someone who had been involved in a tragic accident would be ipso facto on its face, prima facie, biased and prejudiced in the case, but of course the Court will remember the testimony of Mr. Bradley, who testified from the stand that he, his wife, his family, anyway, made contact with attorneys the afternoon of this accident. Less than 12 hours later after this accident had taken place. They had already hired or contacted a law firm in Columbia, Missouri to represent them in a civil action against this defendant and I think that that's . . . is very important for the Court's consideration as to bias, as to interest and also as to the credibility.

I think one thing that is further important as far as the Court is concerned in . . . in actually determining the quantum of evidence presented by the State, so as to cause this defendant's ah . . . parole to be revoked would be that the victim himself, Timothy Bradley made no statements from the witness stand, no testimony whatsoever concerning his conversations or conversation with this defendant in his hospital room prior to the defendant's arrest.

Now, we've heard the testimony from other witnesses, the mother, the sister, the father, also the roommate [133] that these statements were made, that they took place, but yet Timothy Bradley was not called upon to say, to back up the statements that his mother, his father, and his sister gave this Court concerning the admissions of guilt on behalf of defendant, Jim Romano.

Now, we are quite cognizant of the fact that there does not have to be a showing, a burden of proof to be borne for . . . by the State in this particular case beyond

a reasonable doubt. But, again, we state to the Court that this defendant has been in jail for approximately five weeks since this particular incident took place for which he is now standing before the Court to be adjudged as to whether or not his parole is to be continued or is to be revoked. And I submit to the Court that based upon the evidence that you've heard here today, based upon the content of the reports of the hearings and so on, which have been conducted by the State Department of Probation and Parole, that I don't believe there is enough here today before this Court to cause Jim Romano to go to prison and serve those prison terms which are hanging over his head.

So, therefore, at this time Your Honor, we would ask the Court to consider again very carefully the evidence that's been presented today, the source of the evidence, from who it came, the quantity of the [134] evidence, hearsay as opposed to direct evidence, and we would ask you to continue this defendant's parole. Thank you.

COURT: Thank you Mr. Baldwin. If you'll give me a few minutes to review my notes, I'll give you a decision.

BALDWIN: Also, Your Honor, we would ask that ah . . . the Court make some finding of fact and conclusions of law in this particular type of proceeding too.

COURT: All right.

(COURT RECESSED AT 11:52 A.M.)

(COURT RECONVENED AT 11:55 A.M.)

COURT: Court will reconvene from recess. Ah . . . gentlemen, one case I've been referring to all morning. cites, said I must make a written findings of what evidence I rely on. In this case, now I'm prepared to do that. What I'm going to do . . . what I was asking Mr. Romano if he had any suggestion on how they do it up north.

I'm going to announce my decision and dictate into the record the facts I rely on and then I will supply it by written record.

Mr. Romano, for your information, so you won't be in suspense, I am going to revoke your parole and I'm going to order you to serve your sentence in Missouri Department of Corrections the term of 20 years. I base [135] that upon the evidence that the witnesses presented here today. The evidence of police officer Larry Wright in that he related he talked to Jody Seificas wherein the night of the accident wherein she testified to him, although she refused to testify today that she was driving the motor vehicle. I'm further basing my decision on the testimony and the evidence of Mary Ann Bradley, Coleen Hilbert, and James F. Bradley, who related your direct statement in their presence and in the presence of the victim. "It was too bad he jumped out in front of you," which in my opinion was freely and voluntarily made and were made in your presence, of course, because you made them.

Also, the report of Chris Egbert that was stipulated to that there was no accident reported from 2:05 a.m. until 12:55 p.m. on June 15th, satisfies the requirements of the statute that you did leave the scene of an accident without reporting that accident as soon as possible to a police officer as required by Missouri Statute.

The Court also rules that the witness Jody Seificas waived her right against self-incrimination when she answered the question and the only reason there was any further response to it was that the Court stopped the question to further inquire of her of that [136] witness wherein in response to the question she answered, yes. she was a passenger in that car that night. The Court's also taking that evidence into consideration in making its decision to revoke this parole.

Any questions?

BALDWIN: Your Honor.

COURT: The only . . . the only problem I have now is Mr. Romano is whether you want to stay here before I give the written facts or whether you want to be transported to Missouri Department of Corrections in Jefferson City, Missouri to start serving your 20 year sentence?

ROMANO: I would just as soon go to Jeff City, sir.

COURT: All right. I'll give you time to consult with your attorney and your parents before you make a final decision as to that question I just asked you. Mr. Baldwin.

BALDWIN: Might I ask the Court a question concerning the time that Mr. Romano has been in jail since the 15th day of June up to the present.

COURT: He would be allowed good time towards serving of the sentence. I think that's prescribed by statute. You want additional time Mr. Romano, to talk to your attorney before you decide if you want to stay here or [137] if you want to go to Jefferson City, Missouri Department of Corrections?

ROMANO: Yes, I will talk to my attorneys.

COURT: All right. We'll take a short recess for you to do that at this time. I want . . . I want to know before I leave today.

(COURT RECESSED AT 11:53 A.M.)

(COURT RECONVENED FROM RECESS)

COURT: Mr. Romano, what's your decision?

ENG: He will not stay here Your Honor.

COURT: All right. Is there any objection on behalf of Mr. Romano or his attorneys that the written report is required by the case law be supplied to his attorney and to him after the date of this hearing?

ENG: No.

BALDWIN: No.

COURT: Or after he's transported to the Department of Corrections? All right. It is the order of this Court that the defendant, James or Nicholas James Romano be transported to the reception center of Missouri Department of Corrections in Jefferson City, Missouri there to be kept and confined in an institution or institutions to be designated by said Missouri Department of Corrections for a period of 20 years unless [138] sooner discharged according to law.

ENG: Your Honor, could I . . . their . . . the press in Columbia had some misconfusion. Those are concurrent sentences?

COURT: Yes. Now this is . . . there's 20 years been pronounced on counts 1 and count 2 and the Court has the final judgment states as . . . that the sentences shall be served concurrent and not consecutive.

ENG: Thank you.

COURT: And that is still the order of the Court. Defendant is allowed good time for the time he has been in jail since June 15th. That . . . let's compute that right quick. 34 days. Defendant allowed 34 days good time towards the serving of this sentence.

ROMANO: Your Honor, could I say something?

COURT: Yes.

ROMANO: Could I spend a little bit of time with my parents and friends?

COURT: You can discuss that with the sheriff. You're in the custody of the sheriff and ask him about it. If you have a waiting room, you might consider letting him Sheriff, but that's your decision. Cost taxed to defendant. Court will be in recess.

* * *

[139] CERTIFICATE

I, JO SCHICKEDANZ, Certified Court Reporter and Certified Verbatim Reporter for Division II of the 26th Judicial Circuit of Missouri, at Lebanon, Missouri, do hereby certify that I appeared at the time and place first hereinabove set forth, and that I tock the entire proceedings had in the within entitled cause, and that the foregoing 139 pages constitute a true, correct, and complete transcript of the said proceedings.

/s/ Jo Schickedanz
Jo Schickedanz, Official Court Reporter

COSTS: $97.30
139 pgs @ .70

EXHIBIT A

(Filed July 22, 1977)

IN THE
CIRCUIT COURT OF LACLEDE COUNTY, MISSOURI

Case No. 2437

STATE OF MISSOURI,
Plaintiff,

vs.

NICHOLAS JAMES ROMANO,
Defendant.

MEMORANDUM OF FINDINGS

This case comes to be heard on revocation hearing on the above named Defendant before Division II of the Circuit Court of the 26th Judicial Circuit on Monday, July 18th, 1977.

Missouri Department of Probation and Parole represented by Earl Seitz of Boone County's Prosecuting Attorney's office which representation is permitted by the Court.

Defendant is represented by Pat Eng, and James E. Baldwin. Both sides announce ready.

Upon inquiry of the Court, Defendant, through his attorneys, acknowledges that a preliminary hearing was held on the allegations of violating his parole by leaving the scene of an accident and that he was served with a copy of the findings of said preliminary hearing.

The Court finds it has jurisdiction over the parties and subject matter having previously sentenced the Defendant in the instant case, that the case is properly before this Court for hearing on the merits.

The Court after hearing the evidence hereby revokes the parole of the Defendant and orders execution of the sentence heretofore imposed by the Court.

The Defendant is ordered transported to the reception center of the Missouri Department of Corrections in Jefferson City, Missouri, to be kept and confined for a period of twenty years unless sooner discharged according to law.

Defendant allowed thirty-four days good time towards serving of the sentence.

The Court renders it's decision of revoking the Defendant's parole based upon the following evidence:

1) Timothy Bradley was struck by a silver Datson 280 Z in the city of Columbia, Missouri, in the early morning hours of June 15th, 1977, based upon the testimony of Timothy Bradley.

2) Gary Saunders testified that he watched Terry De Haven get out of the passenger side of the automobile after the victim, Timothy Bradley, was struck. Witness Saunders further testified upon talking with Witness De Haven at the hospital that De Haven related to him that he had told the police that he didn't know anything about the accident but De Haven indicated to Witness Saunders that the Defendant was driving the motor vehicle at the time of the accident.

3) Witness Larry Wright, police officer of Columbia, Missouri, testified that he talked with Witness Jody Siefkas

at the scene of the accident and she advised him that Jim Romano was the driver of the car that struck Timothy Bradley.

4) Mrs. Mary Ann Bradley testified that the Defendant Romano came to the room where her son, Timothy Bradley, was hospitalized and made the statement; "It's too bad you jumped in front of me."

5) Witness Colleen Hilbert, sister of Timothy Bradley, was present in Timothy Bradley's room at the time that the Defendant James Romano appeared in the room and her testimony related that Defendant Romano stated; "It's too bad you had to jump out in front of me like that, it was a nightmare."

6) James F. Bradley, father of Timothy Bradley, testified that a man entered the hospital room, whom he could not see since he is blind, but was advised by his daughter that the man was defendant, James Romano; and the Defendant stated; "Why did you have to jump out in front of me?"

7) Witness Chris Egbert's testimony was stipulated to by the attorneys, that no accident was reported to the Columbia Police Department, from 2:05 a.m. to 12:55 p.m., June 15th, 1977, by the Defendant or anyone.

8) The Court rules that the Witness Jody Siefkas intelligently understood the questions and knowingly answered the questions and did thereby wave the 5th Amendment Constitutional Right against self-incrimination and her answer is considered as material in assisting the Court in determining the Defendant did in fact drive the automobile that struck Timothy Bradley.

9) The Court further based it's decision upon the appearance and demeanor of the witnesses and the interest of the witness in the outcome of the trial, and found the victim's mother, father and sister to be truthful and straight forward in their answers.

10) The Court further finds Witness Terry De Haven to be evasive towards the answering of the questions and that the Witness Jody Siefkas was evasive and repeatedly claimed the 5th Amendment Constitutional Right against self incrimination until it was finally waived on being re-called as a witness in an obvious attempt to protect the Defendant in addition to herself.

Dated this 22nd of July, 1977:

/s/ Dean Whipple
Dean Whipple
Circuit Judge, Division II
26th Judicial Circuit

CERTIFICATE OF SERVICE

I, ..., hereby certify that I served the foregoing Memorandum of Findings on Case No. 2437, State of Missouri v. Nicholas James Romano, this ..... day of ....., 1977, by personally handing a true copy thereof to Nicholas James Romano.

.....

The decision of the Hon. Clyde Cahill, District Judge, granting respondent a writ of habeas corpus, is reported at 567 F.Supp. 882 (E.D. Mo. 1983). The complete text of the decision is reproduced for the Court at pages 28-53 of the separate appendix to petitioner's Petition for Writ of Certiorari.

The decision of the United States Court of Appeals for the 8th Circuit affirming the district court's grant of the writ of habeas corpus to respondent is reported at 735 F.2d 319 (8th Cir. 1984). The complete text of the opinion is reproduced for the Court at pages 3-27 of the separate appendix to petitioner's Petition for Writ of Certiorari.

(3)

Office-Supreme Court, U.S.
FILED
JAN 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-465

In the Supreme Court of the United States

OCTOBER TERM, 1984

DR. LEE ROY BLACK, Director of the Missouri Department of Corrections and Human Resources; DICK D. MOORE, Chairman, Missouri Board of Probation and Parole,

Petitioners,

vs.

NICHOLAS J. ROMANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether this Court's decisions in *Morrissey v. Brewer*, 408 U.S. 471 and *Gagnon v. Scarpelli*, 411 U.S. 778, require a state sentencing judge to affirmatively consider alternatives to incarceration before revoking probation that judge originally granted.

2. Whether the Due Process Clause should be extended to require state sentencing judges to affirmatively consider alternatives to incarceration during a probation revocation hearing.

3. Whether the decisions of the courts below applied the wrong standard in reviewing a state court decision in a habeas corpus case and improperly shifted the burden of proof to petitioners.

4. Whether the Eighth Circuit erroneously affirmed an unjustified remedy in a habeas corpus case under the circumstances.

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No. 84-465

In the Supreme Court of the United States

OCTOBER TERM, 1984

DR. LEE ROY BLACK, Director of the Missouri Department of Corrections and Human Resources; DICK D. MOORE, Chairman, Missouri Board of Probation and Parole,

Petitioners,

vs.

NICHOLAS J. ROMANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Missouri, granting respondent's petition for a writ of habeas corpus, is reported as *Romano v. Black,* 567 F.Supp. 882 (E.D. Mo. 1983). The complete text of this opinion is produced for this Court at Pet. A. 28-53. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, affirming the decision of the District Court, appears at 735 F.2d 319 (8th Cir. 1984). The complete text of this opinion is produced for this Court at Pet. A. 3-27.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1984 (P.A. 3). A petition for rehearing was denied on June 28, 1984. The petition for a writ of certiorari was filed on August 30, 1983 and granted on November 26, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fourteenth Amendment to the United States Constitution provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. Title 28 U.S.C. § 2254 reads in pertinent part as follows:

> "A. The Supreme Court, a justice thereof, a Circuit Judge, or a District Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

> B. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

3. Revised Missouri Statutes § 195.200(4) (1969) reads in pertinent part as follows:

> (4) Except as provided in paragraph (c) of subdivision (1) of subsection 1 of this section, for the offense of selling, giving or delivering any controlled substance listed in Schedule I or II to a person, by imprisonment in a state correctional institution for a term of not less than five years nor more than life imprisonment.

STATEMENT OF THE CASE

On November 15, 1976, Nicholas "Slick" Romano entered guilty pleas to a two count indictment charging him with the transfer and the sale of a controlled substance (J.A. 23-28). On April 13, 1977, the Honorable Dean Whipple, Judge of the Circuit Court of Laclede County, Missouri, sentenced Romano (herein referred to as respondent) to two terms of 20 years to be served concurrently. Execution of said sentences was suspended and respondent was placed on probation for five years (J.A. 41). On June 15, 1977, respondent was involved in a traffic accident which led to his being charged with the felony of leaving the scene of an accident. On July 18, 1977, respondent's probation was

revoked and he was ordered incarcerated (J.A. 102). The charge of leaving the scene of an accident was subsequently reduced and respondent was convicted of careless and imprudent driving on October 12, 1977.

On March 28, 1980, respondent filed a *pro se* motion for post conviction relief in the Circuit Court of Laclede County seeking to challenge the probation revocation proceedings. Said motion was overruled as the Court held that the proper remedy was to file a habeas corpus petition (Respondent Ex. I filed below). Respondent thereafter filed a petition for writ of habeas corpus in the Circuit Court of Cole County, Missouri, however, said petition was dismissed by the Circuit Court of Cole County on procedural grounds (Resp. Ex. G). Respondent thereafter went back to the Circuit Court of Laclede County where his motion for reconsideration of his request for post conviction relief was dismissed. Respondent filed a Notice of Appeal with the Missouri Court of Appeals, Southern District, but said appeal was dismissed.

On April 14, 1980, Respondent filed a petition for writ of error *coram nobis* challenging the constitutionality of his careless and imprudent driving conviction. Said petition was dismissed and respondent's out of time appeal to the Missouri Court of Appeals, Eastern District, was subsequently dismissed for failure to prosecute.

On June 12, 1981, respondent filed a petition for writ of habeas corpus with the United States District Court, Eastern District of Missouri, again challenging his conviction for careless and imprudent driving. On October 2, 1981, the Honorable John F. Nangle denied respondent's habeas corpus petition and ordered that his case be dismissed (Resp. Ex. K). On appeal from this dismissal respondent for the *first time* in federal court raised the

ground that his probation revocation was improper, this being some four years after he was incarcerated. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's dismissal and, as to the new ground, dismissed said claim without prejudice for failure to exhaust available state remedies (Resp. Ex. L).

On October 4, 1982, respondent filed a habeas corpus petition with the Missouri Supreme Court challenging his probation revocation. On October 18, 1982, the Missouri Supreme Court denied said petition without opinion (Resp. Ex. N). Thereafter, respondent filed the petition for writ of habeas corpus with the United States District Court for the Eastern District of Missouri which has led to this grant of certiorari.

During the taking of respondent's guilty plea in 1976, he was interrogated by the Court in connection with his past, the incident which led to the charges and the voluntary nature of his plea. Respondent's crime concerned his possession of 26 pounds of marijuana. It appears that respondent was attempting to trade this marijuana for opium or heroin. Respondent had harvested the marijuana, refined it and packaged it into 26 one pound plastic bags (J.A. 27). A pre-sentence investigation was ordered. On April 13, 1977, hearing was held on respondent's sentencing. At the sentencing hearing respondent testified and there was also testimony by a man who identified himself as the respondent's employer. Respondent's counsel also introduced a psychological evaluation which was rendered by one Sheldon Silk and an affidavit by a man named Clark. Respondent's counsel then made a statement to the Court in support of the Court's granting the respondent probation. Respondent's counsel discussed the fact that the pre-sentence investigation report as well as in the evaluation by Mr. Silk, that the respondent had trouble reconciling

himself with authority figures. Respondent's counsel urged that the respondent be placed on probation (J.A. 37-40). Thereafter, the trial judge, the Honorable Dean Whipple, indicated that he had "labored with this case" for some time and that he had decided to place the respondent on probation (J.A. 43). This decision was contrary to the recommendation of the pre-sentence investigation report and the recommendation of the prosecutor. On June 14, 1977, only approximately two months after the respondent was placed on probation, the incident which led to his probation revocation occurred. A hearing was held on July 18, 1977, before Judge Whipple concerning this probation violation and the respondent's probation was revoked.

At respondent's probation revocation hearing in 1977, he was represented not by one but by two attorneys. At the hearing Mr. Gerald Saunders testified that at approximately 2:00 a.m. on June 14, 1977, he was standing in front of the Stein Club in Columbia, Missouri, when he saw a Datsun speeding down Broadway, swerve over the center line, make a U-turn and come back by the Stein Club, swerving into the parking area. At the time the car struck one Timothy Bradley. Mr. Saunders saw the car then swerve to stop and Miss Jody Seificas and Mr. Terry DeHaven got out of the car. The car then pulled across the street into a parking area and when Saunders looked again it was gone. Saunders then testified that in a later conversation Terry DeHaven informed him that the respondent was driving the automobile (J.A. 58-65).

Police Officer Larry Wright testified that he arrived at the scene after he received a radio dispatch and began to interview witnesses. Upon questioning Jody Seificas, she indicated that she had been riding in the vehicle involved in the accident and that the driver was respondent. Police

Officer Wright also testified that upon interviewing Saunders, he was informed that Saunders saw Seificas get out of the driver's side of the car but that it appeared to Saunders that she got out of the back seat of the car (J.A. 68-77). There was also testimony from the mother of the victim, the father of the victim, and the victim's sister, that on the next afternoon they were visiting Timothy Bradley in his hospital room when the respondent came to the room. Mrs. Bradley stated that the respondent told her son "It's too bad you jumped in front of me." (J.A. 79). Timothy Bradley's sister, Colleen Hilbert, testified that the respondent stated "Too bad you had to jump right in front of me like that, it was a nightmare." (J.A. 83). Mr. Bradley testified that the respondent stated "Why did you jump out in front of me?" (J.A. 87). There was similar testimony that from the time of the accident until approximately an hour after the respondent's arrest there were no calls to the police station by anyone identifying themselves as James Romano reporting an accident and in fact no one claiming to be a driver or a passenger of a car called in to report the accident (J.A. 89).

Jody Seificas when first called to testify refused to reveal any information concerning the night of the incident, claiming her Fifth Amendment rights. Upon being recalled, Seificas admitted that she told a police officer on the night of the accident that she had been a *passenger* in the car (J.A. 90-94). Thereafter, respondent called one witness to testify that he was in the hospital room with the respondent and other witnesses and that he did not hear the statement attributed to the respondent, although statements could have been made which he did not hear. The case was then extensively argued by respondent's counsel (J.A. 98). Following a short recess, the court informed the respondent that he was going to revoke probation.

Following respondent's probation revocation he was incarcerated in the Missouri Department of Corrections and Human Resources until December 1982, when he was granted a parole.

SUMMARY OF ARGUMENT

The actions of the courts below were without precedent and wholly unjustified. After an extensive hearing that accorded Respondent James "Slick" Romano a full measure of due process, the state trial judge, whom the record in this case reveals to be conscientious and scrupulous to a fault, determined that respondent had violated the probation the judge previously had awarded by committing another felony, and executed the sentence he originally had suspended. The courts below held: (1) that the trial judge, even though he had already considered alternatives to incarceration at the original sentencing, was required to reconsider those alternatives before imposing the original sentence; (2) that the State of Missouri in this habeas corpus proceeding was required to prove that the trial judge had considered alternatives to incarceration, the trial judge's statement that he had done so being insufficient; and (3) that respondent should be unconditionally released, the State of Missouri being given no opportunity to correct the alleged errors the lower courts found. No decision by this Court authorizes, even by implication, the first holding. The latter two holdings are flatly contrary to the established precedent of this Court.

Morrissey and *Gagnon* do not require a sentencing judge who has granted a defendant probation to reconsider alternatives to incarceration before revoking that probation. In fact, no prior decision of this court so holds. This Court has maintained that the minimal requirements of

Due Process in probation revocation hearings are narrow and limited. The record reveals that respondent received all the process he is due from a thorough and scrupulous judge.

This Court has established that the minimal requirements of Due Process in probation revocation hearings are only that a probationer be given written notice of the alleged violation and that he be made aware of the evidence against him, that he be given an opportunity to appear and present evidence and confront the witnesses against him, and that a "neutral and detached" officer decide the case and issue a written statement of findings and reasons for revocation. It is undisputed that respondent was given these safeguards. The courts below, without citation to a single supporting Supreme Court case, held that respondent was entitled to the additional protection of an affirmative consideration of alternatives to incarceration, despite the fact that any such alternatives had been considered when respondent was originally sentenced.

The lower courts were wrong when they read into *Morrissey* and *Gagnon* the new requirement of a consideration of alternatives to incarceration. The Eighth Circuit's opinion contradicts the clear import of Supreme Court decisions in this area. In the most recent discussion of probation revocation by this Court, this court clearly avoided reliance on *Morrissey* and *Gagnon* to support its ruling that a probationer was entitled to a consideration of alternatives. This Court expressly limited this requirement to situations where a person loses probation due solely to his indigency.

Remarkably, the Eighth Circuit refused to require a consideration of alternatives to incarceration when it recently reviewed a probation revocation by one of its own

district courts. The Eighth Circuit relied on *Morrissey* and *Gagnon*. In the present case, however, the Court offered no justification for requiring a state to provide more Due Process than a federal court in similar circumstances.

Although the Eighth Circuit relied on a Missouri Supreme Court case to support its holding, Missouri law does not provide the support desired. Missouri Supreme Court cases stand only for the proposition that a state judge must give a probationer the *opportunity* to present alternatives to incarceration. If this opportunity is utilized, then the court is *presumed* to have considered those alternatives. In the present case, respondent was given an opportunity to present alternatives to his incarceration and he failed to do so.

The Due Process Clause should not be extended to require an affirmative consideration of alternatives to incarceration for several compelling reasons. First, a sentencing judge necessarily considers alternatives to incarceration at the time probation is granted. There is no need to require that this process be affirmatively duplicated during a revocation hearing. It can fairly and reasonably be assumed that a sentencing judge is cognizant of the alternatives to incarceration he considered earlier and that he has considered them anew.

Second, this Court's recent pronouncement on the consideration of alternatives to incarceration clearly limited such a requirement to cases where probation is revoked due solely to the defendant's indigency.

Third, in that the decision to incarcerate rather than continue on probation is a subjective one based on abstract factors, a requirement that a judge explain why certain alternatives were rejected would be overburdensome. That would be very much like requiring a judge to explain why one witness is more "credible" than another.

Finally, expanding Due Process as the Eighth Circuit has done would violate the principle of comity. Federal courts would be able to reverse state courts by merely discovering some imaginative "alternative" to a particular inmate's incarceration that the state judge failed to consider. Moreover, the Eighth Circuit's holding could easily be extended to the sentencing phase of a trial, thus spreading the encroachment by the Eighth Circuit on state courts.

The courts below shifted the burden of proof to the state and away from the habeas corpus petitioner. The court relied on the absence of an *affirmative* consideration of alternatives to incarceration and required petitioners to prove otherwise. To compound this impropriety, the district court refused to give petitioners an opportunity to carry that burden when it refused to grant an evidentiary hearing. This put petitioners in a terrible Catch-22 situation.

The courts below should not have required proof that respondent's probation was not unconstitutionally revoked. Had the Eighth Circuit given the state judge's findings the presumption of correctness to which they are entitled, there would have been a more than adequate basis for finding that the state judge properly revoked respondent's probation. Instead, the Eighth Circuit distorted the facts in an attempt to mitigate and refute the state judge's findings. This was reversible error.

Finally, the Eighth Circuit was wrong to affirm respondent's outright release. A release from custody is a drastic remedy reserved for only the most extreme circumstances. The record clearly reveals that the district court below had no reasonable grounds for depriving the State of Missouri of an opportunity to correct the alleged Due Process defect. This Court's prior rulings demonstrate the error of the Eighth Circuit's ways, justifying a reversal.

Accordingly, this Court must instruct the courts below as to the limits of Due Process in a probation revocation hearing and hold that a sentencing judge is not required to affirmatively consider alternatives to incarceration before revoking probation.

ARGUMENT

I. *MORRISSEY* AND *GAGNON* DO NOT REQUIRE A SENTENCING JUDGE WHO HAS GRANTED A DEFENDANT PROBATION TO RECONSIDER ALTERNATIVES TO INCARCERATION BEFORE REVOKING THAT PROBATION.

No decision of this Court holds that a state sentencing judge must affirmatively consider alternatives to incarceration when he justifiably revokes a probation he previously has granted, and the Due Process Clause should not be interpreted to require a judge to do so.

A) The minimal requirements of Due Process in probation revocation hearings are narrow and limited and respondent received all the process that is due.

This Court stated the minimal constitutional requirements for Due Process in a probation revocation hearing in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973). In *Gagnon*, this Court held that the Due Process previously required for parole revocation in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 44 (1972), is also required when probation is revoked. This Court held that a probationer, after initially being charged with violating a condition of his probation, must be given a preliminary hearing. *Gagnon, supra*, 411 U.S.

at 784, 93 S.Ct. at 1760. The purpose of the hearing is to determine if probable cause exists to believe that the probationer has violated a condition of his probation. *Gagnon, supra,* 411 U.S. at 784, 93 S.Ct. at 1760, *citing Morrissey, supra,* 408 U.S. at 487, 92 S.Ct. at 2603.

In the final revocation hearing, *Morrissey* and *Gagnon* hold as the "minimum requirements of Due Process" that a probationer be given:

> (a) written notice of the claimed violation of [probation or] parole;
>
> (b) disclosure to the [probationer or] parolee of evidence against him;
>
> (c) an opportunity to be heard in person and to present witnesses and documentary evidence;
>
> (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
>
> (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
>
> (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking [probation or] parole.

Gagnon v. Scarpelli, supra, 411 U.S. at 786, 92 S.Ct. at 1762, *citing Morrissey v. Brewer, supra* at 489, 92 S.Ct. at 2604.

The record reveals that the Honorable Dean Whipple scrupulously accorded respondent *every* one of these constitutional safeguards. Respondent was given a preliminary hearing (Joint Appendix, hereinafter "J.A." 48) even though he was not entitled to one as he was already under arrest. See *Moody v. Daggett,* 429 U.S. 78, 86, n.7, 97 S.Ct.

274, 50 L.Ed.2d 236 (1976). Moreover, respondent was given written notice of the charges against him (J.A. 48). Certainly, during the hearing respondent was made painfully aware of the evidence against him and was given substantial leeway in the cross-examination and confrontation of the State's witnesses. Although a judge is not necessary, respondent was awarded a "neutral and detached" judicial officer as well as a full written statement by that officer of his findings and the reason for revocation of probation (J.A. 107).

B) The lower courts' reading of *Morrissey* and *Gagnon* is contradictory to this Court's prior rulings.

The Eighth Circuit and the district judge below did not hold that *any* of the specific Due Process requirements were denied respondent, but instead held that respondent was denied a heretofore unrecognized right to have alternatives to his incarceration considered during his probation revocation hearing. *Romano, supra,* 735 F.2d 322-323 (Petitioner's Appendix, hereinafter "P.A.", 18-22); *Romano, supra,* 567 F.Supp. at 887 (P.A. 51-52). It is the position of petitioners that the Eighth Circuit erred when it affirmed the District Court's creation of a new Due Process requirement for probation revocation hearings.

Neither *Morrissey* nor *Gagnon* can fairly be read, as the lower courts read them, to require a sentencing judge to consider alternatives to incarceration before revoking probation. One reason is that such a reading would be inconsistent with the language this Court used in deciding *Morrissey* itself:

> If it is determined that petitioner's admitted parole violations to the Parole Board, as Iowa contends, and if

> *those violations are found to be reasonable grounds end the matter. Morrissey, supra*, 408 U.S. at 490, 92 S.Ct. at 2605 (emphasis added).

The italicized part of that statement simply cannot be squared with a reading that a parole board (or, as in this case, a sentencing judge) *must*, as a matter of constitutional compulsion, consider alternatives to incarceration.

A second reason is that this Court itself has not read *Morrissey* or *Gagnon* to require a consideration of alternatives. The conclusive illustration of this is *Bearden v. Georgia*, ... U.S. ....., 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). *Bearden* held that a sentencing judge must consider alternatives to incarceration before revoking the probation of a probationer who has merely failed to make financial restitution due to indigency. The opinion was crafted with painstaking care both to justify the requirement that alternatives be considered and to limit the situations to which that requirement applied. Both *Morrissey* and *Gagnon* were analyzed extensively in *Bearden*. But if the lower courts' reading of *Morrissey* and *Gagnon* in the instant case is correct, and a sentencing judge *must* consider alternatives during a revocation hearing then the careful opinion in *Bearden* is nothing but surplusage, and *Bearden* would have been decided by a routine citation to *Morrissey* and *Gagnon*. It is simply inconceivable that not a single member of this Court would have made that argument in *Bearden* if, as the lower courts held, that is the proper interpretation of *Morrissey* and *Gagnon*. As noted by Justice White when he considered a requirement that alternatives to incarceration must be considered as part of Due Process "there is *no* support in our cases, or in my view, the Constitution, for this *novel* requirement." *Bearden, supra*, 103 S.Ct. at 2074 (emphasis added).

C) The Eighth Circuit itself does not require its district judges to consider alternatives to incarceration when revoking probation.

Remarkably, the Eighth Circuit has also previously dealt with the question of whether *Morrissey* and *Gagnon* require a sentencing judge to expressly consider alternatives to incarceration before revoking probation. In *United States v. Burkhalter,* 588 F.2d 604 (8th Cir. 1978), a federal probationer's probation was revoked after a determination that he had failed to take vocational training and to comply with the rules of a halfway house where he was assigned. On appeal, Burkhalter argued that the trial judge failed to prove that he violated a condition of his probation, relied on hearsay to revoke his probation and failed to consider alternatives to incarceration, complaints strikingly similar to those originally alleged by the respondent in this case.

The Eighth Circuit relied on *Morrissey* and *Gagnon* to assess the Due Process claims alleged in *Burkhalter* as they did in the present case. However, they reached a decidedly different result. The Court noted Burkhalter's "absenteeism at school, generally poor attitude towards his work, and lack of attention to the rules and regulations of the halfway house." *Id.* at 607. This was seen as indicative of Burkhalter's "inability to accept responsibility and live within the rules of his probation". *Id.* The Court went on to say that "the district court *presumably* considered these facts in determining whether appellant's chances of becoming a useful citizen would be better served if he successfully completes a probationary program or if he is imprisoned. Under the circumstances, the district court did not abuse its discretion in finding that treatment had failed or was about to fail and ordering

appellant's probation revoked." *Id.* (emphasis added). Clearly, in *Burkhalter*, the Eighth Circuit did not feel *Morrissey* and *Gagnon* required that a judge expressly consider alternatives to incarceration before revoking probation.

Since *Burkhalter* utilized the same *Morrissey* and *Gagnon* Due Process analysis the court used in the present case, it appears the Eighth Circuit is requiring more due process for state probationers than federal probationers. In the eyes of the Eighth Circuit, a federal judge is entitled to broader discretion and greater deference than a state judge. The Eighth Circuit had absolutely no justification for requiring a higher constitutional standard of all state courts than it required for its own federal district courts. Even though *Burkhalter* was cited and argued by petitioners, the Eighth Circuit did not overrule, distinguish, or even cite *Burkhalter* or in any manner explain how or why it can require a state court to give a probationer more Due Process protection than it requires for federal probationers based on the exact same Supreme Court cases and constitutional analysis. This glaring inconsistency alone warrants reversal.

The Eighth Circuit in *Burkhalter* stated that "this court has traditionally given a great deal of latitude to the judge in a revocation proceeding." *Id.* at 606, citing *United States v. Strada*, 503 F.2d 1081, 1085 (8th Cir. 1974). Apparently state courts are not deserving of this traditional grant of latitude by the Eighth Circuit. Nonetheless, *Burkhalter* stands for the proposition that a sentencing judge need not affirmatively consider alternatives to incarceration before revoking probation, substantial evidence of the Eighth Circuit's error.

D) The State of Missouri does not require a judge to affirmatively consider alternatives to incarceration, but merely gives a probationer the right to introduce such alternatives pursuant to *Morrissey* and *Gagnon*.

In the present case, the Eighth Circuit also turned to the Missouri Supreme Court for support by its citation of *Abel v. Wyrick*, 574 S.W.2d 411 (Mo. banc 1978). The Eighth Circuit sought to establish that Missouri courts would agree with their holding that Due Process requires an affirmative consideration of alternatives to incarceration in every case of probation revocation. This is not true. After *Abel*, the Missouri Supreme Court again considered *en banc* the issue of whether an affirmative consideration of alternatives to incarceration is required in a sentencing judge's statement as to why probation was revoked. In *Sincup v. Blackwell*, 608 S.W.2d 389 (Mo. banc 1980), appellant Sincup had pled guilty to burglary. His sentence of eight years was suspended and he was placed on five years probation. One of the conditions of his probation was that he abstain from the consumption of alcohol. He violated this condition one month after receiving probation. His probation was subsequently revoked.

Before the Missouri Supreme Court, Sincup alleged, among other things, that the sentencing judge denied him Due Process by failing to expressly consider alternatives to incarceration before revoking his probation. *Sincup, supra*, 608 S.W.2d at 392. The Court held that Sincup's Due Process rights under *Morrissey* and *Gagnon* were not denied by the court's failure to affirmatively consider alternatives to incarceration. 608 S.W.2d at 393. In support of its holding the Court cited the Eighth Circuit's opinion in *Burkhalter*. *Sincup, supra*, 608 S.W.2d at 393.

The court in *Sincup* distinguished *Abel* because the trial judge in *Abel* expressly *refused to allow the probationer to offer mitigating evidence or alternatives* to his incarceration. The Court noted that Sincup's attorneys argued for alternatives to incarceration and this was determinative. Thus, the Missouri Supreme Court's rulings are more properly read as holding only that Due Process requires that a probationer be given an opportunity to present alternatives to incarceration as part of his right to an opportunity to be heard. Once such alternatives are offered, a reviewing court should assume these alternatives were considered absent clearly convincing evidence to the contrary.

In the respondent's guilty plea hearing in the present case, Judge Whipple considered the argument for probation as an alternative to incarceration as argued by respondent's attorneys. Respondent's attorneys did not reassert these arguments again during the probation revocation hearing but elected instead to contest the violation iteslf. There is no reason to assume that Judge Whipple did not nonetheless consider the arguments in favor of continued probation before revoking Romano's probation. Respondent had the opportunity to present more elaborate alternatives and he failed to do so. The duty of raising creative alternatives to incarceration should fall on the probationer or his attorneys, C. Long, Law Notes 14:13, 45-48 (summ. 1978). When Judge Whipple ordered and considered a presentencing report, he did more than can be legitimately required. In order to satisfy fundamental Due Process requirements of *Morrissey* and *Gagnon*, Judge Whipple's statement of reasons needed only to be sufficiently specific to enable a reviewing body to determine whether probation was revoked for an impermissible reason, or for no reason at all.

The proposition that Due Process requires only that a probationer be given an opportunity to present alternatives to incarceration can be found in *United States ex rel. Sims v. Sielaff*, 563 F.2d 821 (7th Cir. 1977); *Atkins v. Marshall*, 533 F.Supp. 1324 (D.C.S.D. 1982), and *Ready v. United States Parole Commission*, 483 F.Supp. 1273 (D.C. Pa. 1980). Moreover, it only makes sense, as creative alternatives to incarceration are more properly classified as the type of mitigating evidence a probationer might want to offer in his behalf to avoid incarceration. The right to introduce mitigating evidence has already been established in *Morrissey* and *Gagnon*.

It should also be noted that academic analyses of *Gagnon* and *Morrissey* do not suggest that these cases require that alternatives to incarceration be expressly considered in every case of probation or parole revocation.[1] Other lower courts agree.[2]

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1. As examples, petitioners ask this Court to consider the following exemplary sources: Project, *Thirteenth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeal*, 1982-1983, 72 GEO. L.J. 185 (December, 1983); Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeal*, 1981-1982, 71 GEO. L.J. 339 (December, 1982); Project, *Eleventh Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeal*, 1980-1981, 70 GEO. L.J. 465 (December, 1981); Project, *Tenth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeal*, 1979-1980, 69 GEO. L.J. 151 (December, 1980); Project, *Ninth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeal*, 1978-1979, 68 GEO. L.J. 279 (December, 1979); 65 J. CRIM. L. & CRIMINOLOGY 46 (1974); Fisher, *Parole and Probation Revocation after* MORRISSEY *and* GAGNON; 11 U.Balt.L.Rev. 272, 296 (Winter '82); G. Killinger, H. Kerper & P. Cromwell, *Parole and Probation in the Criminal System*, 17-30 (1976); S. Rubin, H. Weihofen, G. Edwards & S. Rosenzweig, *The Law of Criminal Corrections*, 176-179 (1976).

2. For the proposition that, once a serious violation is proven, no further due process is needed. *See, Marishita v. Morris*, 702 F.2d 207 (10th Cir. 1983); *United States, v. Bazzano*, 712 F.2d 826 (3rd Cir. 1983); *United States v. Stine*, 675 F.2d 69 (3rd Cir. 1982) (held specifically that due process did not require an affirmative consideration of alternatives to incarceration).

II. DUE PROCESS SHOULD NOT BE EXTENDED TO REQUIRE SENTENCING JUDGES TO CONSIDER ALTERNATIVES TO INCARCERATION WHEN REVOKING PROBATION.

A) There is no need to expand the Due Process requirements of *Morrissey* and *Gagnon* as a sentencing judge necessarily considers alternatives to incarceration as a prerequisite to the original grant of probation.

The Eighth Circuit read too much into *Gagnon*. *Gagnon* "set forth the requirement of written findings in the context of an administrative hearing and did not directly deal with judicial probation and judicial revocation." *Marishita v. Morris*, 702 F.2d 207, 209 (10th Cir. 1983). When reviewing a state judge's probation revocation, a federal habeas court can look to the transcript of the proceedings for the judge's findings and reasons. *Marishita, supra*, 702 F.2d at 209. Legal scholars in the law of probation and parole agree with this position. See N. Cohen & J. Gobert, *The Law of Probation and Parole*, 641-642 (1983).

There is good reason to evaluate the reasons requirement differently when considering a sentencing judge's revocation of probation. "The sentencing court when revoking probation goes through the same kind of mental operation as when sentencing was pronounced in the first place." *United States v. Colvin*, 644 F.2d 703 (8th Cir. 1981). The sentencing judge necessarily is cognizant of the factors considered by that same judge during sentencing. Obviously, the mere fact that respondent was given probation is evidence that Judge Whipple considered the alternative to incarcerating respondent. Judge Whipple, in granting probation to respondent, stated "Mr. Romano, I've labored with this case for some time as I do with any

case where there is a possibility of sending somebody to the penitentiary." (J.A. 41). Judge Whipple then granted respondent's request for probation despite a pre-sentence report recommending immediate incarceration. When respondent reappeared before Judge Whipple so soon after receiving probation, Judge Whipple had *already* considered alternatives to incarcerating respondent, and in fact had once applied that alternative. Once Judge Whipple found that respondent had violated his probation by committing a felony, this indicated "to the Court that it erred in its original determination that the defendant did not need to serve his prison sentence in order to be rehabilitated." *United States v. Bazzano*, 712 F.2d 826, 839 (3rd Cir. 1983).

That this was Judge Whipple's reason for revoking respondent's probation is clear when you look to why Judge Whipple granted respondent probation in the first place. During respondent's probation hearing Judge Whipple stated:

> Now the reason I have considered placing you on probation is because this is an offense you have committed in possessing and selling and not an offense against the body or person of another individual involving another individual. (J.A. 43).

Clearly Judge Whipple saw respondent's probation violation as eliminating the only factor in favor of respondent receiving probation. Thus, in light of the factors Judge Whipple considered during sentencing, it is clear that there is no need for him to *reconsider* these same factors during revocation of probation.

Since an administrative board would not have originally granted probation, administrative boards have *not previously* considered alternatives to a particular proba-

tioner's incarceration. Judge Whipple gambled on an alternative to respondent's incarceration and lost. *Morrissey* and *Gagnon* did not require that he expressly reconsider alternatives when he revoked respondent's probation. Thus, when this Court reviews the transcript of the state proceedings, instead of limiting itself to the Statement of Findings, this Court will find that Judge Whipple necessarily considered alternatives to respondent's incarceration and there is no need to expand the *Morrissey* and *Gagnon* requirements to include an *affirmative reconsideration* of alternatives to incarceration when a sentencing judge revokes probation.

B) This Court's only pronouncement on the consideration of alternatives to incarceration painstakingly limited such a requirement.

This Court's most recent discussion of alternatives to incarceration and probation revocation hearings occurs in *Bearden v. Georgia*, ... U.S. ....., 103 S.Ct. 2064, 76 L.Ed. 2d 221 (1983). In *Bearden*, this Court held that a sentencing judge must consider alternatives to incarceration before revoking the probation of a probationer who has merely failed to make financial restitution through no fault of his own.

Because of the nature of this Court's analysis in *Bearden*, it is the position of petitioner that *Bearden* is limited to situations where a person's probation is revoked due to his poverty. This is evident from this Court's reliance on Equal Protection analysis based on *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) and *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). This has also been the conclusion of academic reviewers of the *Bearden* decision.[3]

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3. 12 Am.J.Crim.L. 91-97, March 1984.

In framing the primary legal issue facing this Court in *Bearden*, the Court stated: "today we address whether a court can revoke probation for failure to pay a fine and restitution *when there is no evidence that the petitioner was at fault* in his failure to pay or that alternative means of punishment were inadequate," *Id.*, 103 S.Ct. at 2069, n.7 (emphasis added). Clearly, from the outset, this Court saw the probationer's fault as being a material concern in deciding whether a trial court erred in failing to affirmatively consider alternatives to incarceration.

In deciding that the sentencing judge in *Bearden* should have considered alternatives to incarceration, this Court noted in another footnote: "In contrast to a condition like chronic drunken driving, however, the condition at issue here, indigency, is itself no threat to the safety or welfare of society". *Id.*, 103 S.Ct. at 2070, n.9. In contrast to the violation in *Bearden*, the violation by respondent, hit and run driving, is a clear threat to the safety and security of society. At best, *Bearden* requires a consideration of alternatives only when the probation violation is technical or unintentional. Thus, the state trial judge could have properly concluded that a convict who would run over a friend and leave him injured without stopping to help his victim, is not responsible enough for any sort of probation, especially when the convict offers no justification for his action.

C) It would be impossible for a court to say "why" alternatives to incarceration were rejected as this necessarily involves a subjective discretionary decision based on a myriad of factors.

The decision to grant some type of probation as an alternative to incarceration involves a great many factors,

many of which are applicable to every case.[4] The alternatives to incarceration required by *Bearden* are distinguishable in that they were concrete, i.e. reduce restitution, extend time for payments or allow back payments to be made up later. These alternatives can be considered in light of the concrete factor of the defendant's ability to pay. However, when a judge is considering the broader question of whether a probation violation is "serious" enough to indicate an "inability" or "reluctance" to achieve rehabilitation without incarceration is a judgment which necessarily deals with abstract principles.

Thus, to require a sentencing judge to detail "why" specific alternatives to incarceration were rejected would be much like requiring a judge to explain "why" one witness was more "credible" than another. Such reasons are simply ineffable. Due Process need require no more than a judge's statement as to the evidence, findings and conduct of the probationer that led to revocation.

D) An expansion of *Morrissey* and *Gagnon* to require a consideration of alternatives to incarceration would violate the principle of comity.

District Judge Cahill suggested that Judge Whipple should have "considered public service work, mandatory driver's training classes and even restitution to Timothy

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4. Common factors include: the defendant's attitude toward crime and rehabilitation, the defendant's truthfulness, the defendant's willingness to assist law enforcement efforts, the defendant's willingness or refusal to plead guilty, defendant's dangerousness, defendant's prior criminal record, prior arrest and uncharged misconduct, defendant's employment record, presentence report records, defendant's records, seriousness of crime and defendant's "credibility". See N. Cohen, J. Gobert, *The Law of Probation and Parole*, § 2.06-§ 2.27.

Bradley and his family as viable options." *Romano, supra,* 567 F.Supp. at 886 (P.A. 48). By this statement, the federal judge second-guessed the state judge and found that the state judge was at fault for failing to be more creative than he. If the concept of comity requires some deference and respect by federal courts to state courts, then the district court below has rejected this time honored concept. Petitioner need not engage in labored analysis to demonstrate to this court that, under the Eighth Circuit's opinion, any time a federal court can think up an imaginative alternative to incarceration not expressly considered and rejected by a state judge, that court can order a state prisoner released due to the state judge's failure to consider a "viable alternative".

Moreover, the holding by the Eighth Circuit threatens the integrity of state court sentencing. It is axiomatic that the liberty interest held by a parolee or probationer is substantially less than that held by a presumptively innocent criminal defendant. If a probationer's liberty interest is substantial enough to require a judge to consider alternatives to incarceration during probation revocation, then it is only a matter of time before the Eighth Circuit requires state judges to consider such alternatives during the sentencing phase of the trial.

As yet, the Due Process Clause does not require an affirmative consideration of alternatives to incarceration at the sentencing stage of a criminal trial. In *United States v. Grayson,* 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 592 (1972), the dissenting opinion noted: "In many cases it would be impossible to discern whether a sentencing judge had been influenced by his belief [about the evidence], since there is no requirement that reasons be given." *Id.,* 438 U.S. at 55, n.1, 98 S.Ct. at 2618, n.1 (Stewart, J., dissenting).

Requiring judges to affirmatively consider alternatives to incarceration would add more difficulty to an already serious task as noted by the D. C. Circuit Court of Appeals:

> We should not adopt an unrealistic view of the sentencing process that can only deter trial judges from articulating their reasons fully, because those reasons allow correction when the facts relied upon are indeed 'inaccurate'. Judges ought not be reprimanded for acknowledging the impact of the evidence presented during the trial unless the weighing in of such evidence compounds a just result. Accordingly, when cases of this nature are heard on appeal, we should review the record to ensure that there is a persuasive basis for the conclusions reached by the sentencing court. *United States v. Campbell*, 684 F.2d 141 (D.C. Cir. 1982).

Clearly, if state trial judges are burdened by the prospect of a federal judge second guessing their consideration of alternatives to incarceration, they are likely to defer more of their discretion to plea bargains and jury recommendations or, for self protection, to require extensive trial like sentencing hearings which are certain to add increased congestion to already congested state court dockets. "[C]onsiderations of comity and proper respect for the state courts counsel against precipitous action to invalidate their judgment. If, when viewed against the backdrop of all the facts, the state court decision may be found to be correct, it should not be overturned because it is based on less than all information which can be made available to the district court." *McNair v. New Jersey*, 492 F.2d 1307, 1309 (3rd Cir. 1974).

Finally, should the Eighth Circuit be affirmed, there is a substantial risk that every state in the union will be

burdened with writs of habeas corpus requesting an outright release due to a state judge's failure to consider alternatives to incarceration. Moreover, to the extent that the state writs are unsuccessful, the federal district courts would likewise be overburdened.[5]

III. THE COURTS BELOW ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO PETITIONERS BY REQUIRING PETITIONERS TO PROVE THAT ALTERNATIVES TO INCARCERATION WERE CONSIDERED.

A) The District Court required petitioners to prove that alternatives to incarceration were considered and deprived petitioners of an opportunity to carry that burden.

The courts below relied on the absence of an affirmative statement by Judge Whipple that he considered alternatives to respondent's incarceration to support their ruling that Judge Whipple failed to do so. This obviously put petitioners in the position of having to prove that alternatives were considered. However, even then, the District Court compounded its error by *denying* to petitioners an evidentiary hearing so that petitioners could carry the burden erroneously placed on their backs.

The reported decision of the district court contains the following language:

> The Court recognized that there was insufficient basis in the record upon which to render an informed deci-

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5. According to the Bureau of Justice Statistics in its report "Probation and Parole 1982", 1.5 million adults were on probation or parole. This included 1,335,359 on probation and 243,880 on parole. This figure comprises 72% of all adult offenders under correctional supervision. Clearly, an affirmance of the Eighth Circuit's opinion would have drastic ramifications nationwide. 14 CRIM. JUST. NEWSL. 4 (Oct. 10, 1983).

> sion on Romano's habeas petition. So, the Court held an evidentiary hearing to allow the parties to adduce additional evidence and testimony on this matter. The parties chose not to present testimony and relied solely on the attorney's oral argument. *Romano, supra,* 567 F.Supp. 882 (D.C. Mo. 1983) (P.A. 31).

This statement is not true. The district court did not allow the introduction of evidence. The district judge would allow *only* oral argument. After Judge Cahill issued his opinion, counsel for petitioner (then respondent) introduced "Respondent's Motion to Amend the Judgment, Vacate or Set Aside the Judgment and Grant An Evidentiary Hearing," filed in the record on June 29, 1983. Respondent Romano also realized the erroneous finding and filed a "Motion to Correct Technical Error In Memorandum Opinion of June 20, 1983" on June 27, 1983.

In response to these dual motions the district court issues an order on July 1, 1983 removing the following language:

> So, the court held an evidentiary hearing to allow the parties to adduce additional evidence and testimony on this matter. The parties chose not to present testimony and relied solely on the attorneys' oral argument.

The court replaced this language with the following:

> Therefore, the Court granted Romano's motion for oral argument in order to obtain answers to any questions the Court had concerning the circumstances surrounding this case.

Thus, the opinion still includes Judge Cahill's finding that the record was insufficient. Petitioners are not able

to say whether the Eighth Circuit was aware of this discrepancy. The Eighth Circuit's failure to even address the argument by petitioners that there should have been an evidentiary hearing may well have resulted from a mistaken belief that petitioners had waived any claim to such a hearing. The court should nonetheless have been aware of the mistake as the district judge's amendment to his opinion was in the record. The result is that the Eighth Circuit affirmed the district court's shift of the burden of proof to petitioners and then tacitly affirmed that court's refusal to give petitioners an opportunity to carry that burden. The burden of proof in a habeas corpus hearing is on the prisoner petitioning for such relief and *not* on the state. *Hawk v. Olson*, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61 (1945).

B) The courts below followed the wrong standard of review and thus granted respondent a writ of habeas corpus because the petitioners "failed" to "prove" that the state court's decision was constitutional.

When a federal court is reviewing state judicial proceedings for their validity under the United States Constitution, the scope of review is narrower than when that same federal court reviews a federal court below it. The scope of review of a state court proceeding is "the narrow one of Due Process", and "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice' ". *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 1877, 70 L.Ed.2d 431 (1974). The scope of review is limited to a determination of whether the state body acted arbitrarily or capriciously or whether, as a matter of law, there

has been no violation of probation. See, *Martineau v. Perrin*, 601 F.2d 1201 (10th Cir. 1979). The scope is narrow because federal courts do not have supervisory power over state courts. *DeChristoforo, supra; Milton v. Wainwright*, 407 U.S. 321, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972). A federal court must not overrule a state court's decision merely because it disagrees with the state court regarding the weight of the evidence. *Maggio v. Fulford*, ... U.S. ....., 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983). Thus, federal courts are required to afford state court findings a "presumption of correctness." *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

Yet, the courts below nonetheless strongly attacked the findings of Judge Whipple. In their zeal to release respondent, they denied Judge Whipple's findings their due presumption of correctness by reading the record in a light most favorable to respondent which is itself contrary to established precedent in habeas corpus proceedings involving state prisoners. The court below simply distorted the record.

The court below clearly sought to characterize respondent's probation violation as minor or technical. The Eighth Circuit stated: "The facts do not compel a conclusion that Romano's effort at rehabilitation had failed or that he represented a danger to himself or society." *Romano, supra*, 735 F.2d at 323 (P.A. 21). The court accused Judge Whipple of ignoring mitigating evidence, yet the court ignored a specific evidentiary finding and supporting evidence when it stated: "While it is true that Romano did not immediately report the accident and that he did leave the scene, given his other post-accident behavior it hardly can be said that he sought to escape responsibility for his actions." *Id.* at 323. This observation ignores the fact that witnesses testified that Romano came to the hospital and attempted to shift responsibility for the accident

to his victim (J.A. 79, 83, 87). Respondent also failed to report his accident (J.A. 89).

The courts below made much of the fact that the event that led to respondent's probation revocation resulted only in a misdemeanor conviction for careless and reckless driving. Respondent was convicted in a bench trial (see Exhibit D of Respondent's Amended Petition for Writ of Habeas Corpus). Obviously, once respondent's probation had been revoked and his twenty-year sentence reinstated, county officials saw no need to go through the expense and time of a felony jury trial. In fact, the prosecutor may very well have reduced the charges in exchange for Romano's waiver of a jury. Such things are a common occurrence when probation has been revoked.

There was more than sufficient evidence from which Judge Whipple could find that respondent committed the felony of leaving the scene of an accident. There was even enough evidence to convict respondent. *State v. Cochran*, 496 S.W.2d 825 (Mo. banc 1973). Thus, there is no grounds for the Eighth Circuit's implied challenge to Judge Whipple's findings, and thus, analysis of the weight that ought to be accorded to the evidence reduces the presumption of correctness Judge Whipple is entitled to without justification.

Moreover, both courts treated respondent as though he were a first offender. But the record plainly discloses that respondent had previously been arrested for narcotics violations twice and been convicted once (J.A. 25-27).

The circuit court sought to bolster the credibility of Mr. "Slick" Romano by saying that respondent's behavior after running down his friend did not indicate that respondent sought to escape responsibility for his action. To the contrary, respondent's behavior after striking his victim

clearly demonstrated his attempt to escape responsibility for his actions.

The record shows that respondent's car was found, not at his house, but at the home of his long-time friend and employer (J.A. 71). The record shows that, when found, his car was parked not on the street, but at the end of the driveway farthest from the street (J.A. 71). The record shows that, when found, the car was covered with a floor mat to conceal the damage that had been done to it in striking the victim (J.A. 72). Moreover, who can say what respondent's condition was at the time he drove into the victim Bradley? The witnesses' description of the movement of respondent's car immediately prior to the collision (speeding; wild U turn; crossing the center line) (J.A. 59) at least gives rise to a reasonable inference that respondent might have been intoxicated with some drug—alcohol, marijuana, or something else. But respondent's flight and concealment for the next 12 hours prevented any determination of his condition at the critical moment. Finally, although the record is not as clear on this point as it might be, it is a reasonable inference that respondent was concealed in the home of his long-time friend, and did not go to the hospital to visit the victim until he knew the police had discovered his car. Respondent's drug conviction was "not an offense against the body or person of another." (J.A. 43); the offense that justified revoking probation was.

The Eighth Circuit also stated that Judge Whipple gave respondent the maximum sentence (P.A. 20). However, under Missouri law, the maximum sentence for the sale of a controlled substance is 5 years to life for the first offense. 195.200(4) Revised Mo. statutes (1969). This remains the penalty today. Thus, Judge Whipple gave a lenient sentence. In that respondent was seeking to deal in

heroin at the time of his arrest, the sentence given was consistent with other sentences involving heroin cases in the area of Laclede County (J.A. 37).

Therefore, we can see that the Eighth Circuit ignored the presumption of correctness to which Judge Whipple's findings were entitled and that the courts below distorted the facts to refute the state judge's findings and support their release of a state prisoner. The courts ignored the clear evidence that Judge Whipple considered alternatives and, by shifting the burden of proof to petitioners, ignored and in fact sought to disprove the presumptively correct findings that supported the state judge's decision, and denied petitioners an opportunity to present evidence that Judge Whipple provided respondent with full Due Process. The Eighth Circuit's paternalistic handling of a Missouri state court decision is unjustified. It was error for the Court to affirm a decision that shifted the burden of proof to petitioners to come forward with evidence to prove that alternatives to incarceration were considered, then denied to petitioners the opportunity to provide that proof. The Eighth Circuit must be reversed.

IV. THE EIGHTH CIRCUIT ERRONEOUSLY DENIED THE STATE OF MISSOURI AN OPPORTUNITY TO CORRECT ANY DEFECT IN THE DUE PROCESS GIVEN TO RESPONDENT, WITHOUT JUSTIFICATION, AND GAVE RESPONDENT OUTRIGHT RELEASE.

If this Court elects to affirm the Eighth Circuit's determination that Due Process requires an expressed consideration of alternatives to incarceration by the judge revoking probation, then this Court should nonetheless reverse the Eighth Circuit's affirmance of the remedy granted respondent: outright release. In light of the fact that

no prior Supreme Court ruling requires that alternatives to incarceration be expressly considered in *all* probation revocation hearings, and in light of the fact that it is clear that the state judge did in fact consider alternatives to incarceration, the remedy granted by the district court and affirmed by the Eighth Circuit can only be viewed as drastic and punitive against the State of Missouri.

Assuming that respondent was denied Due Process, there is no question but that the appropriate remedy was to require the State of Missouri to hold a new probation revocation hearing to see if there were in fact viable alternatives to respondent's incarceration. In *Morrissey*, this Court did not grant outright release. In *Gagnon*, after finding that Scarpelli's probation was revoked without *Morrissey* Due Process, this Court stated: "On remand, the District Court should allow the state an opportunity to conduct such a hearing." *Id.*, 411 U.S. at 791, 92 S.Ct. 1764. In *Bearden*, this court remanded the case to the state for a consideration of alternatives to incarceration.

Likewise, there is no question but that federal courts should give states an opportunity to remedy a Due Process defect in a particular proceeding before they deprive a state of its right to incarcerate an otherwise properly convicted defendant. This is especially true in the case of probation revocation where there are no Due Process deficiencies in either the conviction or sentencing. Outright release is an extraordinary remedy traditionally granted only as a last resort when a state has failed to comply with a court order to remedy a constitutional defect.[6] Even the Eighth Circuit has previously applied

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6. The cases wherein federal courts have given a state an opportunity to correct a due process deficiency are legion. As a representative sampling, petitioner offers the following cases:

(Continued on following page)

this principle. *Robinson v. Wyrick*, 635 F.2d 757 (8th Cir. 1981).

Alternatives to incarceration could have been considered on rehearing by ordering a new presentence report and by taking arguments of counsel on the issue. *Then* if the *state* judge found that there was a realistic alternative to respondent's incarceration, the judge could have released respondent outright. If the state judge did not, then the district court would still have had jurisdiction to review the state court findings and release respondent. In so doing the federal district court would have avoided substituting its own discretion for that of the state judge hearing the probation revocation. *Billiteri v. United States Board of Parole*, 541 F.2d 938 (2nd Cir. 1976).

There is an obvious reason why ordering rehearing is the only appropriate remedy: to give the state the opportunity to conduct a proper hearing. *Gagnon, supra.* Even the Eighth Circuit previously held that a State's right to hold a revocation hearing should not be taken away in the absence of a showing of *demonstrated prejudice* severe enough to render the revocation hearing itself inadequate in terms of relief. *Cleveland v. Ciccone*, 517 F.2d 1082 (8th Cir. 1975). Thus, in *Gagnon*, this Court held that the state should be allowed to hold a rehearing even though the prisoner had served *three years* after revocation and was paroled before his habeas corpus petition was decided, facts extremely similar to the present case. It cannot be said that respondent suffered any deprivation

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Footnote continued—

Dennis v. Solem, 690 F.2d 145, 147 (8th Cir. 1982) (per curiam), (no writ issued where state remedied previous constitutional defect); *Guthrie v. Warden, Maryland State Penitentiary*, 683 F.2d 820, 877 (4th Cir. 1982) (state given reasonable time to retry); *United States ex rel. Masserella v. Elrod*, 682 F.2d 688, 690 (7th Cir. 1982), cert. denied, 103 S.Ct. 1426, 1427.

until a state judge ascertains if reasonable alternatives existed.

The courts below argued that respondent's original probationary period had passed and thus respondent should be released. Again, this is not true. Judge Whipple made it clear that Missouri law precluded a probation term of more than five years at a time but that he could and would add five years to that after the first terms was served (J.A. 43). Thus, respondent actually was given ten years probation. Moreover, to the extent that a rehearing revealed that no valid alternatives existed, respondent was properly on parole.

Petitioners Black and Moore suggest that it is the province of the state and the state alone to decide when a prisoner has served enough time, unless a sentence is shown to be constitutionally excessive. Even if one were to accept that the amount of time respondent spent in prison should be considered, respondent was the one who waited over four years before seeking a state or federal habeas corpus challenging the probation revocation. The State of Missouri should not be made to suffer the prejudice of respondent's outright release when that release is based on a delay caused solely by respondent. See *McDonnell v. Estelle,* 666 F.2d 246 (5th Cir. 1982).

Moreover, the state has a right to observe convicted felons on a conditional release basis before giving them total freedom, unless that felon's conviction was constitutionally defective. Since respondent was not subject to the temptations and opportunities that face law-abiding citizens in society while he was in prison, the court below has effectively ordered the State of Missouri to release a felon when the State cannot assure its citizens that that felon has been sufficiently rehabilitated so as not to constitute a risk to society.

Clearly, "a release from confinement . . . is an *extraordinary remedy* that deserves further discussion." *Green v. Nelson,* 442 F.Supp. 1047 (D.C. Conn. 1977). While it is true that in *Green* the prisoner was released, this was because the United States Parole Commission had engaged in numerous acts violating the constitutional rights of prisoners and had ignored court rulings against the Board. The court in *Green* decided, after fully considering the ramifications of release, that firm measures were required to ensure that the Commission acted constitutionally. *Id.* at 1060. The present case in no manner presents a situation where there is a need to release respondent in order to punish the State of Missouri for repeated violations.

The district court and court of appeals below suggest that there is some prejudice to respondent if he is subjected to the possibility of reincarceration. The Eleventh Circuit Court of Appeals made an excellent response to this issue in *United States ex rel. Graham v. United States Parole Commission,* 732 F.2d 49 (11th Cir. 1984). In *Graham,* an inmate had sought a writ of habeas corpus challenging certain parole regulations. Before his request was decided, he was released on parole. He appealed the dismissal of his case as moot on the grounds that, should he violate his parole, he would be reincarcerated and again subject to the "unconstitutional" parole regulations. The court responded "We believe this potential controversy is too *speculative* for adjudication". *Id.* at 850 (emphasis added).

The Eighth Circuit cited *Iasigi v. Van de Carr,* 166 U.S. 391, an 1897 Supreme Court case, as one the state should *see* to support the Court's ruling that Romano's release was not an abuse of discretion. *Iasigi does not even marginally support the drastic actions taken by the district court in*

the present case. Joseph Iasigi was arrested in the City of New York on charges of embezzlement arising in the State of Massachusetts. Iasigi filed a *habeas corpus* petition alleging that he could not be sent to Massachusetts because, at that time, he was the duly recognized Counsel General of the Sultan of Turkey. The district court denied the writ and remanded Iasigi to state custody. On appeal, the Supreme Court found that at the time Iasigi was remanded to state custody, he was no longer the Turkish Sultan's Counsel General, and thus the remand was affirmed. Clearly, not only does *Iasigi* not support the ruling that Missouri should be denied a chance to hold a new revocation hearing for respondent, but it is so totally unrelated to the issues before this Court, that its citation suggest plain error, requiring a reversal. The only portion of the entire opinion even marginally related to the present case is a portion quoting Justice Gray in *Nishimura Ekiu v. United States,* 142 U.S. 651, where the judge said:

> "A writ of habeas corpus is not like an action to recover damages for unlawful arrest or commitment, but its object is to ascertain whether the prison can legally be detained in custody; and if sufficient ground for his detention by the government is shown, *he is not to be discharged for defects in the original arrest or commitment.*"

Iasigi, supra at 393 (emphasis added). This quotation supports petitioners' contention that a mere defect in a revocation hearing, committing respondent to prison, does not justify his discharge from custody by a federal court. Therefore, an error has occurred in that the Eighth Circuit refused to hold the district court abused its discretion in completely releasing a convicted felon validly sentenced to twenty-years in prison without first giving the State of

Missouri an opportunity to provide respondent with a hearing in accordance with the court's ruling. The law on this issue was clearly overlooked and misapplied, justifying a reversal.

CONCLUSION

The decision of the Eighth Circuit under review should be reversed and respondent returned to his status as a parolee in the custody of the Missouri Board of Probation and Parole.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF ALABAMA, ALASKA, ARIZONA, COLORADO, FLORIDA, ILLINOIS, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI STATES

In 1982 over 1.3 million adults were on probation in the United States.[1] Probation revocation hearings are being conducted daily in each state. Thousands of such hearings will be conducted each year in the United States. The states have a definite interest in insuring the prompt and economical administration of their criminal justice systems: "The State, of course, has a fundamental interest in appropriately punishing persons ..... who violate its criminal laws." *Bearden v. Georgia*, 103 S.Ct. 2064 at p. 2071(1983).

If the decision of the Eighth Circuit is affirmed, in the present case, state prison officials will be subjected to numerous additional habeas corpus actions based on the alleged failure of state judges to consider particular alternatives to incarceration. The decision of the Supreme Court of the United States in this case may affect the type of evidence which the state will be required to introduce in a probation revocation case. Affirmation of the Eighth Circuit decision would significantly expand the role of federal courts in reviewing state sentencing and probation revocation procedures. And, finally, the remedy fashioned by the lower federal courts in this case constitutes a shocking intrusion by federal courts into state criminal justice proceedings.

STATEMENT

On April 3, 1977, Nicholas James Romano was given two concurrent twenty-year prison terms. The concurrent sentences were suspended on the condition that Romano abide by the terms of probation for five years. Two months after being placed on probation, Romano ran over a pedestrian and left the scene of the accident. One month

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[1] 14 CRIM. JUST. NEWSL. 4 (Oct. 10, 1983)

later the trial court found that Romano had violated the terms of his probation. The trial court ordered Romano to serve the two twenty-year prison terms.

State authorities released Romano on parole after he had served five and one-half years of his twenty-year sentence.

The United States District Court for the Eastern District of Missouri and the Eighth Circuit of the United States Court of Appeals found (1) that the state judge had failed to consider alternatives to incarceration, (2) that the failure of the judge to consider alternatives to incarceration amounts to a denial of due process, and (3) that an appropriate remedy was an order by the federal court terminating state supervison of Romano's parole.

DISCUSSION

I. THE DUE PROCESS CLAUSE DOES NOT REQUIRE AN AFFIRMATIVE SHOWING THAT ALTERNATIVES TO INCARCERATION HAVE BEEN CONSIDERED EVERY TIME PROBATION IS REVOKED.

No individual should be confined any longer than is necessary to meet the reasonable and proper goals of the state. The reasonable and proper goals of the state include promoting the general safety of its citizens and reforming criminals. Sentencing judges are regularly faced with the extremely difficult task of finding the appropriate sentence for each defendant. Probation is a valuable tool for the sentencing judge. Under proper conditions, probation may benefit the convicted defendant, citizens in general, and overcrowded state prison systems.

From the perspective of the sentencing judge, probation is a viable and valuable alternative to incarceration only if the judge can set reasonable terms of probation and can reasonably expect the terms of probation to be enforced. Probation is a less valuable tool if probation cannot be revoked promptly upon a showing that the defendant has

violated the terms of probation.

The decision of the Eighth Circuit would require state judges to indicate on the record that they had considered alternatives to incarceration at the time of the revocation of probation. The cases cited by the Eighth Circuit in support of its decision do not indicate that the Due Process Clause requires state courts to affirmatively consider alternatives to incarceration. *Morrissey v. Brewer*, 408 U.S. 472 (1972) clearly stated the minimum requirements of due process in revocation proceedings (408 U.S. at p. 489); and both the majority opinion and the dissenting opinion left to the states the authority to establish revocation procedures (408 U.S. at pp. 488, 499). Justice Douglas, dissenting in part, wrote, "We do not sit as an ombudsmen, telling the States the precise procedures they must follow."

Gagnon v. Scarpelli, 411 U.S. 778 (1973) held that due process standards applied to the revocation of probation, held that due process did not include a right to counsel in *all* revocation hearings, and held that the due process rights available in revocation hearings are more limited than the rights of an accused in a criminal prosecution (411 U.S. at p. 789). Despite the holding of *Gagnon*, the Eighth Circuit appears to have afforded Romano a right to which he was not entitled at his original trial and sentencing— the right to require the sentencing judge to consider *on the record* the alternatives to incarceration.

Alternatives to incarceration are mentioned by the Court in *Bearden v. Georgia, supra* at 2072-73:

> If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternate measures are not

> adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.

The language quoted above indicates that at a revocation hearing, the court must consider alternatives to incarceration if the probationer is unable to pay despite bona fide efforts to do so. It seems logical to conclude that if the probationer is able to pay, but refuses to do so, the court is *not* required to consider alternatives to incarceration. Under *Bearden* if Romano had refused to pay a fine, Romano could have been sentenced "to imprisonment within the authorized range" of the court's sentencing authority, apparently without any requirement that the trial court again consider alternatives to incarceration.

II. THE REMEDY ADOPTED BY THE DISTRICT COURT AND THE EIGHTH CIRCUIT IS AN UNWARRANTED INTRUSION INTO STATE CRIMINAL PROCEEDINGS

Petitioner's Brief on the Merits adequately sets forth the reasons that Romano is not entitled to any remedy in this case. If a remedy were warranted, the remedy should be that which least intrudes upon the state judicial system. The remedy fashioned by the lower federal courts displays a shocking disregard for the state judicial system.

In this case the federal courts found that the sentencing judge had failed to consider alternatives to incarceration at the hearing on revocation of probation. The normal, reasonable remedy for such an error, if it was error, would be to remand the case to the sentencing judge for consideration of alternatives to incarceration. Without reference to any statute or relevant case and without logical discussion, the Eighth Circuit summarily freed Romano from further supervision by state authorities. When a federal court deprives a state of jurisdiction over a convicted defendant, the state is entitled to a written

decision which lucidly sets forth the reasons for the action by the federal court. 28 U.S.C. §2254; *Sumner v. Mata*, 449 U.S. 537 (1981).

This Court issued a relevant statement on the relationship between state and federal courts in *Jackson v. Denno*, 378 U.S. 368 (1964). In that opinion this Court held that it was error for a federal court to deprive a state court of the opportunity to hold a hearing which the state court had previously failed to hold. Any other result "would not comport with the interests of sound judicial administration and the proper relationship between state and federal courts." 378 U.S. at 395. This Court, quoting with approval from *Rodgers v. Richmond*, 365 U.S. 354 (1961). expressed a concern about federal judges pre-empting functions "that belong to state machinery in the administration of state criminal law." 378 U.S. at 393. The remedy fashioned by the district court and affirmed by the Court of Appeals in *Romano* violates all of the sound principals discussed by this Court in *Jackson*. *See also Bromley v. Crisp*, 561 F2d 1351 (1977) *cert. den.* 435 U.S. 908.

CONCLUSION

Sentencing judges consider alternatives to incarceration each time a sentencing judge places a defendant on probation. There is no reason to presume that the sentencing judge has forgotten that there are alternatives to incarceration when probation is revoked. Requiring a statement that alternatives to incarceration have been considered is an unwarranted expansion of the Due Process Clause.

The decision of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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FOR ARGUMENT

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NICHOLAS JAMES ROMANO,

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On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED

1. Whether the due process clause of the fourteenth amendment required the Missouri trial court to consider on the record alternatives to incarceration, or state the reasons for its decision, as a prerequisite to revoking respondent's probation and imposing a twenty year prison term based upon conduct for which respondent was ultimately charged and convicted of careless driving and fined $100, which conduct was totally unrelated to the offense for which respondent was incarcerated, namely, the sale of marijuana?

2. Whether the district court and the Eighth Circuit were correct in ordering respondent released from all custody and in not allowing petitioners to hold a new, retrospective probation revocation hearing, after respondent's probation term has already expired under Missouri law, to cure a constitutional defect that occurred in respondent's probation revocation hearing almost eight years ago?

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JURISDICTION

Petitioners' jurisdictional statement requires supplementation. During the pendency of Romano's second habeas petition in the federal courts, the State of Missouri placed Romano on a parole term which expires in 2002. Eighth Circuit Designated Record at 89 [hereinafter cited as R.]. As a parolee, Romano was in "custody" under 28 U.S.C. Section 2254. *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963). In granting respondent a writ of habeas corpus, the district court and Eighth Circuit ordered Romano released from the custody of the Missouri Department of Probation and Parole and the Missouri Department of Corrections and Human Resources. Petitioners have never attempted to stay the execution of the mandates of the lower federal courts.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent has included quotations from the pertinent constitutional and statutory provisions in Appendix A to Respondent's Brief In Opposition To The Petition For A Writ of Certiorari. These provisions include the following:

1. U.S. CONST., amendment XIV, § 1;
2. 28 U.S.C. § 2254(a)-(d); and
3. 28 U.S.C. § 2243.

Respondent has included pertinent quotations in the Appendix to this brief from the following Missouri statutes:

1. Mo. Rev. Stat. § 559.012 (1978);
2. Mo. Rev. Stat. § 549.071.1 (1963, as amended 1967), repealed by L. 1982, at 438, § A;

3. Mo. Rev. Stat. § 549.101.1 (1963, as amended 1965), repealed by L. 1977, at 658, § 1, eff. January 1, 1979;

4. Mo. Rev. Stat. § 549.111.1 (1963, as amended 1967) repealed by L. 1977, at 658, § 1, eff. January 1, 1979.

STATEMENT OF THE CASE

Petitioners have presented a misleading statement of the case by mischaracterizing and omitting critical facts. Rather than restating the undisputed facts, respondent's statement of the case will only correct the inaccuracies in petitioners' presentation.

I. Procedural History

On December 10, 1974, respondent, Nicholas James Romano, was arrested for transferring and selling marijuana. Joint Appendix at 13, 31 [hereinafter cited as J.A.], Tr. at 6, 32. On November 15, 1977, Romano entered guilty pleas before Judge Whipple to two counts of an indictment alleging that Romano transferred (Count I) and sold (Count II) marijuana. J.A. at 11-12, Tr. at 2, 3, 4. On April 13, 1977, Judge Whipple sentenced Romano to two concurrent twenty year terms of imprisonment, but suspended execution of the sentence and placed Romano on probation for five years, the maximum term allowed under Missouri law. J.A. at 41-42, 46-47, Tr. at 46, 53, 54.[1]

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[1] Contrary to petitioners' assertion, Br. at 37, Romano's probation term was five, *not* ten years. J.A. at 41, 43, Tr. at 44, 48. Indeed, Judge Whipple acknowledged that Missouri law precluded him from ordering a probation term in excess of the five year maximum term for felonies. J.A. at 43, Tr. at 48. *See* Mo. Rev. Stat. 549.071.1, (1963, as amended 1967), repealed by L. 1982, at 438, § A; *Smith* v. *Carnes*, 481 S.W.2d 242 (Mo. 1972) (*en banc*) (statutory maximum probation term includes extensions).

On July 18, 1977, Judge Whipple revoked Romano's probation based upon conduct for which Romano, after pleading not guilty, was ultimately charged and convicted of careless driving and fined $100 and costs. After revoking Romano's probation, Judge Whipple executed the twenty year sentence which he had originally imposed and suspended.[2]

The district court described the "extraordinary story" of Romano's futile efforts to seek post-conviction relief in the state courts. Appendix to Petition For A Writ of Certiorari [hereinafter cited as P.A.] at 38-41, *Romano* v. *Black*, 567 F. Supp. 882, 884-85 (E.D. Mo. 1983). The record reflects that not a single Missouri trial or appellate court ever considered the merits of Romano's numerous *pro se* petitions. Moreover, petitioners concede that a Missouri trial judge denied Romano's post-conviction relief petition on improper procedural grounds and also formally advised Romano to pursue further improper procedural remedies. Petition For A Writ Of Certiorari at 3 [hereinafter cited as Pet.]. Romano's reliance on this trial judge's mistaken directions delayed the adjudication of his claims for two to three years.[3]

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[2] After ruling that Romano's probation should be revoked, Judge Whipple was required, under Missouri law, to execute the twenty year sentence which he had originally imposed and suspended. Judge Whipple had no authority to reduce this sentence. *See State ex rel. Wagner* v. *Ruddy*, 582 S.W.2d 692, 693-95 (Mo. 1979) (*en banc*); Mo. Rev. Stat. § 549.101.1 (1963, as amended 1965) (repealed by L. 1977, at 658, § 1, eff. January 1, 1979) (applicable law at the time of Romano's revocation hearing).

[3] Petitioners mislead this Court when they state that, in his initial federal court appeal in 1982, Romano raised "for the first time" the claim that his probation revocation hearing was unconstitutional. Br. at 4-5. To the contrary, in 1980 Romano had challenged the constitutionality of his probation revocation hearing in his state habeas corpus petition. R. at 58-62.

II. Facts Relating To Romano's Guilty Plea And Sentencing Hearings

The following facts emerge from Romano's guilty plea and sentence hearings, J.A. at 10-47, Tr. at 1-54:

1. Romano pleaded guilty to the charge of transferring and selling marijuana in excess of 35 grams. J.A. at 10-12, Tr. at 2-4. The marijuana had a value of approximately $3,000 to $3,200. J.A. at 36, Tr. at 39.

2. Contrary to petitioners' assertion, Br. at 5, the "heroin" involved in Romano's sale of marijuana actually consisted of a baking soda and pancake mix. Romano's Eighth Circuit Br., Addendum A, Supplemental Pre-Sentence Investigation Report at 1 (lodged with this Court). The State of Missouri only sought an indictment for Romano's transfer and sale of marijuana. J.A. at 11-12, Tr. at 2-3.

3. Romano pleaded guilty even though he may have had a meritorious entrapment defense as the State of Missouri had used informers to introduce Romano to various drugs and also used informers to arrange for the actual marijuana sale for which Romano was convicted. J.A. at 15-16, Tr. at 9-10.

4. Romano had no prior felony convictions, J.A. at 31, Tr. at 31-32, and had only a very insignificant misdemeanor conviction for which he received a $50 fine with no term of imprisonment. Romano's Eighth Circuit Br., Addendum B-1, Supplemental Pre-Sentence Investigation Report at 2 (lodged with this Court). Indeed, his prior record was so clean that the Adult Face Sheet, prepared by the Missouri Department of Social Services, states that Romano had no prior "prison" or "non-prison" sentences. R. at 78.

5. During the twenty eight month period between Romano's arrest and his sentencing hearing (December,

1974 to April, 1977), Romano did not commit any criminal offenses with the exception of a minor traffic ticket he received in February, 1977. J.A. at 31, Tr. at 32.

6. Judge Whipple sentenced Romano to an excessive prison term of twenty years even though the pre-sentence investigation report had recommended only five years, Romano's Eighth Circuit Br., Addendum B-2, Pre-Sentence Investigation Report at 5 (lodged with this Court), and the prosecutor had recommended ten years, J.A. at 36, Tr. at 39.[4] Judge Whipple's bizarre sentence indicates an abuse of discretion for two reasons:

(a) The prison term is excessive on its face based on the nature of Romano's offense.[5]

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[4] Romano also presented substantial evidence at his sentencing hearing that his conviction did not require imprisonment. Romano's employer, Mike Atkinson, testified that Romano "does a good job . . . he's conscientious about his work and he's never been any problems [*sic*]." J.A. at 30, Tr. at 30. In addition, Romano tendered to Judge Whipple Dr. Sheldon Silk's favorable psychological evaluation. J.A. at 34, Tr. at 36.

[5] A 1983 study of the average prison sentence for specific offense categories for defendants sentenced in the United States district courts reveals that the average sentence for a felony marijuana conviction was 55.1 months as compared to the 240-month sentence Romano received from Judge Whipple. *Annual Report of the Director of the Administrative Office of the United States Courts*, 343-45 (1983). Romano's sentence exceeded the average sentence for *every* federal offense category, including, for example, first degree murder, rape and kidnapping. *Id.* These statistics do not differentiate between first and subsequent offenses, which makes Romano's 240-month sentence for a first felony offense even more shocking. In light of the record and these statistics, one wonders how petitioners can describe Judge Whipple's sentence as "lenient." Br. at 33.

Members of this Court have expressed dismay at the injustice inherent in sentences which are grossly disproportionate to the

(b) Suspending execution of an extraordinarily severe prison sentence and granting probation, which ostensibly indicates that Judge Whipple believed Romano could be rehabilitated within the community and did not require incarceration, reflects Judge Whipple's misunderstanding of the purposes of probation.[6]

7. Judge Whipple's statements on the record indicate that he "harbored a disposition to send Romano to jail for any probation violation, regardless of the nature of the violation and without regard to any other possible options." P.A. at 23, *Romano* v. *Black*, 735 F.2d at 319, 323 (8th Cir. 1984) (quoting from *Romano*, 567 F. Supp. at 886). *See also Romano*, P.A. at 16-18, 735 F.2d at 322.

III. Facts Relating To Romano's Probation Revocation Hearing Of July 18, 1977

Judge Whipple revoked Romano's probation because he believed sufficient evidence existed to support the

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crime. *Cf. Solem* v. *Helm*, 463 U.S. 277 (1983) (eighth amendment bars sentences which are significantly disproportionate to the crime); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 368-73 (1978) (Powell, J., dissenting). (Justice Powell opined that the prosecutor's plea bargaining conduct violated due process, causing defendant to receive an excessive and unjust sentence.)

[6] The ABA has commented on the unfairness of Judge Whipple's sentence:

> [A] Draconian tendency to impose severe sentences may exist where the court is imposing a suspended sentence that it never expects will be served, since in such instances the court may understandably tend to focus primarily on the value of the suspended sentence as a deterrent threat by which to caution the offender. But the paradoxical result can be that those offenders initially judged more suited for probation thus wind up serving longer periods of confinement.

ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 18-2.3, Commentary at 18-82 to 83 (2d ed. 1980) [hereinafter cited as ABA STANDARDS].

State of Missouri's allegation that Romano had committed the crime of leaving the scene of an accident. J.A. at 102-03, 107-10, Tr. at 134, R. at 47-49. Judge Whipple based his findings on the disputed facts relating to an automobile accident on June 15, 1977, in which Romano's car allegedly struck his close friend, Timothy Bradley, outside of the Stein Club in Columbia, Missouri. The probation revocation transcript, however, casts substantial doubt on Judge Whipple's factual finding that Romano, and not his girlfriend, was the driver of the car which struck Bradley as well as on his legal finding that Romano committed the crime of leaving the scene of an accident.

Timothy Bradley, the victim of the accident who suffered only minor injuries, testified that he could not identify the driver of the car which struck him. J.A. at 54, Tr. at 63. Gerald Saunders, an eyewitness to the accident, testified that Jody Seificas, Romano's girlfriend, left the car from the driver's side. J.A. at 59, Tr. at 72-73. Saunders thought that Seificas was the driver of the car. J.A. at 61, Tr. at 74. Saunders also stated that Terry DeHaven, a passenger in the car, told him later that Romano was driving the car. J.A. At 64, Tr. at 79.

DeHaven's recollection, however, was not credible because DeHaven testified that he was drunk ("totally smashed") prior to leaving the Stein Club with Romano. J.A. at 57, Tr. at 69. DeHaven stated that he had "passed out" in Romano's car and only awoke after the impact of the accident. J.A. at 55-56, Tr. at 65-66. Finally, DeHaven testified that he did not know the identity of the car's driver. J.A. at 58, Tr. at 69. In light of DeHaven's testimony, it is difficult to understand how Judge Whipple could have relied on his statement to Saunders that Romano was driving the car. J.A. At 108; R. at 47-49.

Judge Whipple also based his decision upon the "testimony" of Jody Seificas. J.A. at 109; R. at 47-49. Seificas' testimony related to the critical fact issue of the identity of the driver of the car which struck Bradley. Seificas repeatedly exercised her fifth amendment right against self-incrimination and refused to answer numerous questions about the accident at the revocation hearing. J.A. at 66-67, Tr. at 82-84. Upon being called to testify a second time during the hearing, Seificas replied, "I admit that," to an extremely confusing compound question concering whether she had spoken with a police officer about the accident *and* whether she had told him that she was a passenger in the car. J.A. at 90-91, Tr. at 116-17.[7] She later testified that she did not understand the compound question and, after the question was asked a second time, Seificas refused to answer, invoking her fifth amendment privilege. J.A. at 90-91, Tr. at 117-18. Judge Whipple, however, ruled that Seificas had waived her fifth amendment privilege and also stated that he considered her testimony "material" in his finding that Romano was the driver of the car which struck Bradley. J.A. at 109, R. at 47-49.[8]

Judge Whipple also relied on the testimony of members of Timothy Bradley's family who all offered almost identical testimony. Bradley's mother, father, and sister were

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[7] Judge Whipple never explained how Seificas' response, "I admit that," implied that she was a passenger in the car. Assuming, contrary to Seificas' statement, that she understood Prosecutor Seitz' compound question, she may have only been admitting that she had spoken with a police officer on the night of the accident. Judge Whipple unfairly interpreted Seificas' ambiguous response as an admission that Seificas also told the police officer that she was a passenger in the car.

[8] Charles Franklin, an attorney present in the courtroom at the revocation hearing, supported Romano's position that Seificas did not waive her privilege against self-incrimination. J.A. at 92-93, Tr.

visiting Timothy in his hospital room on Sunday morning, June 15, 1977, approximately ten hours after the accident occurred. Romano arrived to visit Timothy. According to Bradley's mother, Romano told Timothy, "It's too bad you jumped in front of me." J.A. at 79, Tr. at 101.[9]

The family's testimony was not credible. Both of Bradley's parents acknowledged that they had retained a local law firm to represent Timothy in a personal injury action arising from the car accident. J.A. at 80, 88, Tr. at 102-03, 113. Timothy Bradley offered no testimony concerning his alleged conversation with Romano about the accident. J.A. at 49-54, 80, Tr. at 57-64, 102. Moreover, Greg Fallon testified that he was also in Bradley's hospital room during Romano's visit. J.A. at 96, Tr. at 124. While Fallon recalled the conversation between Bradley and Romano and was present for the entire conversation, he did not recall hearing Romano make any statements to Bradley concerning the car accident. J.A. at 96, Tr. at 125.

Judge Whipple evaluated the evidence for only three minutes, J.A. at 102, Tr. at 134, before ruling that:

1. Romano was the driver of the car which struck Bradley;

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at 119-20. Franklin's unusual appearance and statements bolster Romano's contention that Judge Whipple abused his discretion in revoking Romano's probation. In a colloquy with the court, Franklin strenuously objected: "Sir, I have no basis. I have no standing at all to object. I wish I could but I can't. The only thing I can do is inform the Court that ah . . . my decision is that she has not waived her . . . Fifth Amendment privileges." J.A. at 92-94, Tr. at 121.

[9] Mary Ann Bradley offered this testimony verbatim. Bradley's sister and father offered almost identical testimony. J.A. at 79, 80, 83, Tr. at 107, 113.

2. Romano committed the crime of leaving the scene of an accident and, therefore, violated the general condition of his probation agreement in which he had agreed to obey all of the laws of the State of Missouri;[10] and

3. Romano's probation should be revoked and his underlying twenty year prison term should be executed. J.A. at 103-04, Tr. at 135-36, J.A. at 107-10, R. at 47-49.

Judge Whipple found that Romano committed the crime of leaving the scene of an accident despite the evidence which indicated that Romano lacked the requisite intent. Judge Whipple never explained the reason Romano allowed all of his passengers to leave the car to attend to Bradley. The record also reflects that numerous bystanders were present at the parking lot of the Stein Club who attended to Bradley. J.A. at 49, 68, 73, Tr. at 57, 85, 92. Judge Whipple also does not explain the reason Romano visited his close friend, Bradley, at his hospital room only ten hours after the accident. Romano was ultimately arrested in Bradley's hospital room. J.A. at 89, Tr. at 115.

Romano's conduct proved that he did not intend to escape responsibility for his actions.[11] Judge Whipple did

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[10] The State of Missouri required Romano to obey three special conditions of probation which were related to his underlying marijuana conviction and required him to: (1) submit to a drug screening test on demand; (2) restrict his travel; and (3) allow a law enforcement officer to search his personal property at any time. J.A. at 43-44, Tr. at 49, 50. The state never alleged that Romano violated one of these special probation conditions.

[11] The state's failure to prosecute Romano for leaving the scene of an accident confirms that Judge Whipple lacked evidentiary support for his ruling. The state reduced the hit and run charge to careless driving, R. at 52, of which Romano was ultimately convicted. R. at

not even acknowledge this substantial mitigating evidence when he revoked Romano's probation. *See Romano*, P.A. at 20, 735 F.2d at 323.

The probation revocation transcript and the court's "Memorandum of Findings," J.A. at 107-10, reflect that Judge Whipple revoked Romano's probation without considering alternatives to incarceration or explaining the reasons for his ruling. Judge Whipple never explained why the obvious alternatives to incarceration (for example, fine, restitution, drivers' training classes, or public service work) would not be more appropriate than sending Romano to jail for twenty years. Judge Whipple also never discussed the rationale for his decision that Romano's driving offense, which had no relationship to Romano's marijuana conviction, compelled the conclusion

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53. Romano did not receive this reduced charge as a result of a plea bargain because Romano pleaded "not guilty" and vigorously defended himself against the careless driving charge. R. at 53.

Petitioners unfairly seek to malign Romano by consistently drawing inferences from the record that have no factual basis. For example, petitioners "infer" from Saunders' general description of the movement of Romano's car that Romano "might have been intoxicated with some drug—alcohol, marijuana, or something else," Br. at 33, when Romano's car allegedly struck Bradley. Nothing in the record even remotely supports this incredible allegation. Petitioners also fail to state that Saunders' recollection of the accident is tainted by his admission of having "had a few beers" prior to his leaving the Stein Club. J.A. at 61, Tr. at 74.

Police officer Wright testified that Romano's car was found parked in the driveway of the Stein Club owner's house, only six blocks from the accident scene. J.A. at 71, 77, Tr. at 89-98. Petitioner's "infer" from this testimony that Romano drove away from the accident scene to conceal his mental condition. Br. at 33. A more reasonable inference is that Romano drove to his employer's house because he felt frightened in light of his status as a probationer.

that Romano could no longer be rehabilitated or supervised in the community and must, therefore, be incarcerated. *See Romano*, P.A. at 20-21, 47-51, 735 F.2d at 323, 567 F. Supp. at 886-87.

SUMMARY OF THE ARGUMENT

The Missouri trial court arbitrarily revoked respondent's probation without complying with *Gagnon* v. *Scarpelli*'s due process requirement that a trial court consider on the record alternatives to incarceration, or state the reasons for its decision, as a prerequisite to revoking probation. Numerous federal and state courts, as well as expert observers of the criminal justice system, have endorsed the modern penological view that courts should consider alternatives to incarceration before revoking probation.

In *Bearden* v. *Georgia*, this Court followed *Gagnon* in holding that due process requires a trial court to consider alternatives to incarceration before revoking the probation of an indigent who fails to make restitution. The case at bar offers this Court the opportunity to reexamine the application of the due process clause to all probation revocation proceedings.

The probationer has a substantial liberty interest, protected by due process, which should prevent a court from unfairly and arbitrarily revoking probation. Probation also satisfies the state's penological interests in rehabilitating and supervising criminal offenders within the community. Empirical evidence indicates that if probationers are unnecessarily incarcerated, the state and society will be burdened with serious social and fiscal problems. These problems include the greater likelihood that incarcerated persons will become criminogenic and recidivists as well as the high cost of prison overcrowding. Due

process procedures must, therefore, provide safeguards so that judges or hearing officers do not arbitrarily revoke probation.

Respondent respectfully proposes a due process test which will ensure that trial judges adhere to the proper criteria in their probation revocation decisions. Trial courts should consider alternatives to incarceration before revoking probation unless the conduct which constitutes the probation violation compels the court to conclude that the probationer can no longer be rehabilitated or supervised within the community.

Applying this test to the facts at bar, this Court should conclude that the Missouri trial judge erred in failing to consider alternatives to incarceration before revoking respondent's probation. Romano's alleged conduct which constituted his probation violation, careless driving, had no rational relationship to his underlying marijuana conviction. The careless driving offense did not compel the conclusion that Romano could no longer be rehabilitated or supervised in the community, and that he must, therefore, be incarcerated for twenty years.

As a result of his unconstitutional probation revocation hearing, Romano spent five and one-half years in jail. Romano's five year probation term expired in 1982. Under Missouri law, the state no longer has the jurisdiction or custody over Romano's person necessary to conduct a retrospective probation revocation hearing which conforms with due process.

Due process considerations also dictate that this Court should affirm the district court and Eighth Circuit's order releasing Romano from all further custody by the State of Missouri. Romano's efforts to gain post-conviction relief were hampered by the Missouri courts which delayed the timely adjudication of his constitutional claims. Due proc-

ess requires the courts to conduct a probation revocation hearing shortly after a violation occurs. It would be impractical and unfair to allow the state an opportunity to conduct a retrospective hearing concerning events which occurred almost eight years earlier. Justice requires that this Court affirm the lower courts' issuance of a writ of habeas corpus to Romano.

ARGUMENT

I. THE DISTRICT COURT AND EIGHTH CIRCUIT CORRECTLY HELD THAT THE MISSOURI TRIAL COURT VIOLATED RESPONDENT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

A. In *Gagnon* v. *Scarpelli* And *Morrissey* v. *Brewer*, This Court Held That The Fourteenth Amendment Due Process Clause Requires A Trial Court To Consider On The Record Alternatives To Incarceration, Or State The Reasons For Its Decision, As A Prerequisite To Revoking Probation.

In *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), this Court enunciated the minimum due process standards which a state must meet if it wishes to revoke an individual's probation. These standards comprise the "process" due to all probationers and guarantees that the state does not arbitrarily revoke a probationer's significant liberty interest. *Gagnon* recognized that a court must make *two* determinations in deciding whether to revoke an individual's probation: (1) whether the probation terms were actually violated; and (2) if the terms of the probation were violated, "[s]hould the parolee [probationer] be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" *Gagnon*, 411 U.S. at 784 (citing *Morrissey* v. *Brewer*, 408 U.S. 471, 479-80 (1972)).[12]

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[12] *Morrissey* established the due process requirements for parole revocation proceedings, and *Gagnon* applied these requirements to

In exploring the rationale for requiring a trial judge to consider alternatives to incarceration, *Gagnon* identified various competing interests:

> Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion—the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

411 U.S. at 785.

This Court emphasized that rehabilitation, not punishment, is the focus of the probation/parole system. "[T]he whole thrust of the probation/parole movement is to keep men in the community, working with adjustment problems there, and using *revocation only as a last resort* when treatment has failed or is about to fail." *Id.* (citing F. Remington, D. Newman, E. Kimball, M. Melli & H. Goldstein, *Criminal Justice Administration, Materials and Cases* 910-911 (1969)) (emphasis added). Probation should be revoked only when the trial court is convinced that the probation violator's conduct is so serious that he or she "cannot be counted on to avoid antisocial activity." *Morrissey*, 408 U.S. at 479.

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probation revocation proceedings. *Gagnon*, 411 U.S. at 782 n.3. A probationer's due process rights are arguably stronger than a parolee's because a probationer has a higher statistical success rate than a parolee. *See United States* v. *Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978). Also, many probationers have never been incarcerated. These probationers will not be exposed to the ill effects of prison life and are less likely to become recidivists. *See* ABA STANDARDS, *supra* Standard 18-2.3, Commentary at 18-76.

Gagnon and *Morrissey* also require the trial judge to consider alternatives to incarceration *on the record* so that an appellate court can meaningfully review the trial court's ruling.[13] Thus, the trial judge must provide "*a written statement . . . as to the evidence relied on and reasons for revoking [probation or] parole.*" *Gagnon*, 411 U.S. at 786 (citing *Morrissey*, 408 U.S. at 489) (emphasis added.)[14]

Gagnon translates the question of whether a probation violation occurred into the trial court's procedural duty to explain the evidence on which it relies in its ruling. 411 U.S. at 784, 786. The case translates the second question of whether alternatives to incarceration are appropriate into the trial court's procedural duty to explain its reasons for revoking probation. *Id.* "Alternatives" and "reasons" are logically related. One may define probation as an alternative to incarceration. An explanation of the

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[13] Petitioners concede that *Morrissey* and *Gagnon* require the trial court to file a written statement explaining the evidence relied on *and* reasons for revoking probation. Br. at 13-14. Petitioners contend that Judge Whipple satisfied this due process requirement, *id.*, even though the record reflects the contrary conclusion. J.A. at 107-10.

[14] This Court has held in other contexts that due process requires an administrative body or court to make a written statement of the reasons for its decision. *See, e.g., Vitek* v. *Jones*, 445 U.S 480, 495 (1980) (factfinder must make a written statement of reasons for transferring inmate to mental hospital); *Wolff* v. *McDonnell*, 418 U.S. 539, 564 (1974) (factfinder must make written statement of reasons for prison disciplinary proceeding which results in loss of good-time credits); *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970) (decisionmaker should state reasons for terminating welfare benefits); *Kent* v. *United States*, 383 U.S. 541, 561 (1966) (juvenile court must state reasons underlying its order waiving jurisdiction).

reasons for revoking probation necessarily entails an explanation of why alternatives to incarceration are no longer viable.[15]

The Eighth Circuit correctly interpreted *Gagnon* when it held that Romano's probation revocation hearing violated his due process rights. P.A. at 11-24, 735 F.2d at 321-24. The record supports the Eighth Circuit's ruling. The transcript reveals that Judge Whipple never considered alternatives to incarceration. P.A. at 20-22, 49-51, 735 F.2d at 323, 567 F. Supp. at 884, 886. Judge Whipple's written "Memorandum of Findings" only contains a discussion of the evidence relating to the issue of whether Romano was the driver of the car which struck Bradley. J.A. at 107-10. Judge Whipple, however, never explained his *reasons* for revoking Romano's probation as is required under *Gagnon*. *Id.*[16]

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[15] Missouri law recognizes the "last resort" nature of probation revocation by allowing a judge, after finding a violation, to continue the probation term with or without additional conditions. Mo. Rev. Stat. § 549.101.1 (1963, as amended 1967), repealed by L. 1977, at 658, § 1, eff. January 1, 1979 (the applicable law at the time of Romano's revocation hearing).

[16] A record is critical to protect the probationer's due process rights and to allow meaningful appellate review. *See, e.g., Kent* v. *United States*, 383 U.S. 541, 561 (1966) ("Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons . . . [I]t may not "assume" that there are adequate reasons. . . .")

Some courts have held that *Gagnon's* requirement of a *written* statement of reasons or alternatives to incarceration is satisfied if the judge or hearing officer dictates his or her findings into the record which can be transcribed for an appellate court's review. *See, e.g., United States* v. *Martinez*, 650 F.2d 744, 745 n.1 (5th Cir. 1981); *Morishita* v. *Morris*, 702 F.2d 207, 209 (10th Cir. 1983); *Sincup* v. *Blackwell*, 608 S.W. 2d 389, 393 (Mo. 1980) (*en banc*). If this Court adopts this interpretation of *Gagnon*, *Romano* should still be

B. Federal and State Courts Have Uniformly Held That The Fourteenth Amendment Due Process Clause Requires A Trial Court To Consider On The Record Alternatives To Incarceration, Or State The Reasons For Its Decision, As A Prerequisite To Revoking Probation.

Numerous federal and state courts which have considered the constitutional standards for probation revocation proceedings have followed the *Morrissey/Gagnon* requirement that a trial court must consider alternatives to incarceration, or state the reasons for its decision, as a prerequisite to revoking probation or parole.[17] We briefly

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affirmed. The revocation transcript and the court's written memorandum of findings reflect that Judge Whipple did not consider alternatives to incarceration or offer a reasoned explanation to support his decision to revoke Romano's probation. *Romano*, P.A. at 20-22, 48-51, 735 F.2d at 323, 567 F. Supp. at 886-87.

[17] Petitioners now contend, *for the first time in this litigation*, that *Morrissey* and *Gagnon* do not require the trial judge to consider alternatives to incarceration before revoking probation. Br. at 8, 12, 21. In the lower courts, petitioners acknowledged that

> [i]t is clear that under the case law [,] probation revocation is a two-step process. The first step is a factual determination of whether one or more terms of the probation have been violated. If a probation violation is found, the second question to be considered is whether the probationer should be incarcerated or whether other steps should be taken to protect society and improve chances of rehabilitation. (citing *Gagnon* and *Morrissey*).

Petitioners' Eighth Circuit Br. at 1 (lodged with this Court). Petitioners primarily litigated below the issue of whether the trial judge must consider alternatives to incarceration "on the record."

This Court should refuse to allow petitioners to change their legal position. *See, e.g., Alexander* v. *Town & Country Estates, Inc.*, 535 F.2d 1081, 1082 n.1 (8th Cir. 1976) (appellate court will not decide a case on a legal theory on which counsel advanced a contrary position in the court below).

summarize the holdings of selected federal cases: *United States* v. *Martinez*, 650 F.2d 744, 745 (5th Cir. 1981) (district court erred in failing to make written statement of reasons for revoking probation; "pro forma language and routine phrases" will not satisfy due process); *United States* v. *Diaz-Burgos*, 601 F.2d 983, 985 (9th Cir. 1979) (due process requires court to consider whether probation violation "warrants revocation and, if so, what sentence shall be imposed"); *United States* v. *Reed*, 573 F.2d 1020, 1024-25 (8th Cir. 1978) (before revoking probation, the court must consider whether violations are sufficiently serious to justify revocation and whether alternatives to incarceration would be more appropriate); *Atkins* v. *Marshall*, 533 F. Supp. 1324, 1329 (S.D. Ohio 1982) (in expressing its reasons for revoking probation, the trial court must consider whether reincarceration would best improve the probationer's hopes of rehabilitation); *Lawrence* v. *Smith*, 451 F. Supp. 179, 189 (W.D.N.Y. 1978) (parole board must explain its reasons for revoking parole rather than taking alternative action).

We briefly summarize the holding of selected state cases: *State* v. *Ruby*, 650 P.2d 412, 414 (Alaska App. 1982) (proof of probation violation is insufficient to revoke probation as the court must also determine whether rehabilitation of petitioner would be furthered by alternatives to imprisonment such as continuation of petitioner's probation); *State* v. *O'Meal*, 569 P.2d 249, 251 (Ariz. App. 1977) (second facet of probation revocation hearing requires trial court to decide whether "continuation of appellant's probationary status [would] be at odds with the need to protect society and society's interest in appellant's rehabilitation."); *Carradine* v. *United States*, 420 A.2d 1385, 1388 (D.C. App. 1980) (*Gagnon* requires probation revocation proceeding to include a consideration of whether alternatives to incarceration are viable);

Hawaii v. *Nakamura*, 581 P.2d 759, 763 (Hawaii 1978) (Abuse of discretion for court not to consider alternatives to incarceration, especially where punishment for revocation is grossly disproportionate to the violation); *State* v. *Rideau*, 376 So.2d 1251, 1258 (La. 1979) (trial court "abdicate[ed] its responsibility" and violated probationer's due process rights when it failed "to determine whether the drastic remedy of revocation was appropriate"); *State* v. *Austin*, 295 N.W. 2d 246, 250 (Minn. 1980) (court must "find that the need for confinement outweighs the policies favoring probation" before revoking probation); *Abel* v. *Wyrick*, 574 S.W.2d 411 (Mo. 1978) (*en banc*) (abuse of discretion as a matter of law for a court to revoke probation without considering alternatives to incarceration, especially when probation violation is unrelated to underlying conviction); *Commonwealth* v. *Vasquez*, 389 A.2d 111, 113-14 (Pa. Super. 1978) (trial court erred in revoking probation and parole as it made no specific finding that probation-parole violation deserved imprisonment rather than rehabilitation alternative); *Mason* v. *State*, 631 P.2d 1051, 1055 (Wyo. 1981) (after probation violation is found, due process requires court to make a second inquiry to determine whether probation should be revoked).[18]

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[18] Petitioners erroneously cite *United States* v. *Burkhalter*, 588 F.2d 604 (8th Cir. 1978); *Sincup* v. *Blackwell*, 608 S.W.2d 389 (Mo. 1980) (*en banc*); *Morishita* v. *Morris*, 702 F.2d 207 (10th Cir. 1983); *United States* v. *Bazzano*, 712 F.2d 826 (3d Cir. 1983) (*en banc*) *cert. denied, sub nom. Mollica* v. *United States*, ___ U.S. ___, 104 S. Ct. 1439 (1984); and *United States* v. *Stine*, 675 F.2d 69 (3d Cir.) *cert. denied* 458 U.S. 1110 (1982), for the proposition that lower courts have interpreted *Morrissey* and *Gagnon* not to require sentencing judges to consider alternatives to incarceration before revoking probation. Br. at 16-20.

In *Burkhalter*, the Eighth Circuit agreed that *Gagnon* requires the court to consider alternatives to incarceration and to order

C. Numerous Experts Have Endorsed The Modern Penological View That Fundamental Fairness Requires A Trial Court To Consider Alternatives To Incarceration Before Revoking Probation.

Numerous experts have endorsed the *Morrissey/Gagnon* due process requirement that a trial court consider alternatives to incarceration before revoking probation. The American Bar Association has opined that "intermediate steps should be considered in *every* [probation revocation] case as possible alternatives to the imposition of total confinement." ABA STANDARDS FOR CRIMI-

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revocation "only as a last resort." 588 F.2d at 606. The court held that the revocation was proper because the trial court found that the probationer intentionally and consistently violated the special conditions of his probation which indicated that he could no longer be rehabilitated in the community. *Id.* at 607.

Morishita held that "written findings are constitutionally required only if the transcript and the record before the judge do not enable a reviewing court to determine the basis of the judge's decision to revoke probation." 702 F.2d at 210. In the case at bar, however, the transcript and Judge Whipple's written findings reflect that he did not state the reasons for his decision or consider alternatives before revoking Romano's probation.

Bazzano did not even address the issue of alternatives to incarceration. The Third Circuit held that after revoking probation, the trial court need not state its reasons for executing the original suspended sentence which it had given to the probationer after his initial conviction. 712 F.2d at 838-39. This holding applies the general rule that trial judges have no duty to explain the reasons underlying their *sentencing* decisions.

Stine affirmed the constitutionality of probation conditions which require psychological counseling. 675 F.2d at 72. The court also held that the probation revocation was proper because the record reflected that it was the "only alternative." *Id.*

NAL JUSTICE, Standard 18-7.3(d), (2d ed. 1980) (emphasis added) [hereinafter cited as ABA STANDARDS].[19]

D. *Bearden* v. *Georgia* Follows *Morrissey* And *Gagnon* In Holding That Due Process Requires A Trial Court To Consider Alternatives To Incarceration Before Revoking Probation.

Bearden v. *Georgia*, 461 U.S. 660 (1983), held that due process requires sentencing judges to consider alternatives to incarceration before automatically revoking probation for an indigent's failure to pay a fine or make restitution. 461 U.S. at 672. This Court carefully placed its limited holding in the context of the well-entrenched *Morrissey/Gagnon* due process guidelines. "Under our holding the sentencing court must focus on criteria

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[19] *See also* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT, § 3-310, 10 U.L.A. (1984); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, Standard 5.4 (1973); Clarke, *What Is The Purpose of Probation and Why Do We Revoke It?*, 25 CRIME & DELINQ. 409 (1979); F. Remington, D. Newman, E. Kimball, M. Melli and H. Goldstein, *Criminal Justice Administration, Materials and Cases* 910 (1969) (cited in *Gagnon*, 411 U.S. at 784 n.7); DiCerbo, *Why Should Probation Be Revoked?*, 30 FEDERAL PROBATION 11-17 (1966); *see generally* M. Gottfredson and D. Gottfredson, *Decisionmaking In Criminal Justice: Toward The Rational Exercise of Discretion* 212, 214, 335 *et seq.* (1980); D. Gottfredson, L. Wilkins, P. Hoffman, *Guidelines For Parole and Sentencing* 1, 119 *et seq.* (1978).

Petitioners cite numerous academic authorities to support, presumably by negative inference, their argument that *Morrissey* and *Gagnon* do not require trial courts to consider alternatives to incarceration. Br. at 20 n.1. These authorities are irrelevant because while they discuss *Morrissey* and *Gagnon* generally, they do not even purport to address the issue of alternatives to incarceration.

typically considered daily by sentencing courts throughout the land in probation revocation hearings: whether the defendant has demonstrated sufficient efforts to comply with the terms of probation and whether non-imprisonment alternatives are adequate. . . ." *Id.*, 461 U.S. at 673 n.12.

Petitioner Bearden occupied the position of both an indigent and a probationer which gave him *two* due process interests. As Bearden's indigency status was the central factual issue, this Court relied on Justice Harlan's analyses of an indigent's due process rights in *Williams* v. *Illinois*, 399 U.S. 235, 259 (1970) and *Tate* v. *Short*, 401 U.S. 395, 401 (1971). *Bearden*, U.S. at 665, 674 (majority opinion); 461 U.S. at 676 (concurring opinion). The Bearden majority also cited *Morrissey* and *Gagnon* to establish the due proces foundation for this Court's opinion. 461 U.S. at 666 n.7, 669, 671.

Petitioners contend that *Bearden* limits the requirement to consider alternatives to incarceration to cases in which the probationer unintentionally violates his probation. Br. at 24. Justice O'Connor noted, however, that "fault" was a relevant consideration only in cases which presented facts which resembled Bearden's peculiar predicament. 461 U.S. at 668 n.9. Even if one assumes that petitioners' contention is correct, *Romano* was still properly decided because nothing in the record suggests that Romano's alleged probation violation of negligently striking his friend with his car in a dark parking lot was an intentional act. Automobile accidents are unfortunate everyday occurrences. Individuals who are involved in isolated car accidents should not be condemned as possessing antisocial personalities which threaten the welfare of society.

The *Bearden* Court purposesly chose not to establish a rule of law which would alter its *Morrissey/Gagnon*

requirement that judges consider alternatives to incarceration before revoking probation. *Id. Romano* presents the Court with this opportunity. Before a test can be constructed, however, this Court must examine the policies underlying probation and the competing due process interests involved in the trial court's decision to revoke probation.

E. Due Process Must Protect The Mutual Interests Of The Probationer, State, And Society In Allowing Probationers To Successfully Complete Their Probation Terms.

Judge Whipple's initial decision to place Romano on probation triggered his due process rights. "The decision to place the defendant on probation . . . reflects a determination by the sentencing court that the State's penological interests do not require imprisonment." *Bearden*, 461 U.S. at 670. Probation primarily satisfies the state's interests in rehabilitating and supervising a criminal offender in the community. *See Gagnon*, 411 U.S. at 784-85.

The experts also emphasize the "rehabilitative-reintegrative" goal of probation. M. Gottfredson, D. Gottfredson, *Decisionmaking in Criminal Justice: Toward the Rational Exercise of Discretion* 212-14 (1980). *See also* N. Cohen and J. Gobert, *The Law of Probation and Parole* 8-12 (1983) [hereinafter cited as *Probation and Parole*]; ABA STANDARDS, Standard 18-2.3, Commentary at 18-74 to 76. The state's penological objectives of deterrence and punishment have minimal importance in the decision to grant probation. *Id.; see also Gagnon*, 411 U.S. at 785 (focus of probation is to achieve rehabilitation, not punitive goals). *Cf.* Mo. Rev. Stat. Section 559.012 (1978) (court may grant probation if institutional confinement is unnecessary for the protection of the public and rehabilitation can be achieved in the

community); *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 263 (9th Cir. 1975) (*en banc*) (rehabilitation and supervision in the community are policies underlying the Federal Probation Act).

Due process procedures must capture the competing interests of the individual and the state. *Gagnon* recognized that the probationer and state have mutual interests in the "informed use of discretion." 411 U.S. at 785. *See also Romano*, P.A. at 14, 735 F.2d at 322; *see generally Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976) (due process requires this Court to balance the value of additional procedures with the governmental and private interests).

The ABA has identified the mutual objectives which the individual and the state achieve through probation.

> [P]robation is a desirable disposition in appropriate cases for a variety of independent reasons:
>
> (1) it maximizes the liberty of the individual while vindicating the authority of the court;
>
> (2) it eases the reintegration of the offender into the community;
>
> (3) it minimizes the hidden costs that imprisonment places on the family of the offender, in the form of both reduced income and enforced separation; and
>
> (4) it is the most economic form of correctional supervision.

ABA STANDARDS, *supra* Standard 18-2.3, Commentary at 18-75 to 76. This Court must evaluate the strength of Romano's liberty interest and the state and society's interests in ensuring that probation is not unnecessarily or arbitrarily revoked.

1. Romano, The State and Society Have Mutual Interests In Establishing Procedures To Ensure That Probation Is Not Arbitrarily Revoked.

Romano, the state, and society have mutual interests in fair probation revocation procedures which "will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Morrissey*, 408 U.S. at 484 (citing *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections* 83, 88 (1967) [hereinafter cited as *Corrections]*. *See also Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974) ("touchstone of due process is protection of the individual against arbitrary action of government.")[20]

This Court has allowed trial judges to exercise a large amount of discretion in conducting probation revocation hearings. Due process must ensure that judges do not abuse their discretion in the decisionmaking process which is so important to the probationer. *See Lawrence* v. *Smith*, 451 F. Supp. 179, 189 (W.D.N.Y. 1978). As Justice Fortas observed, "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In re Gault*, 387 U.S. 1, 18 (1967). Requiring sentencing judges to consider alternatives to incarceration protects the probationer, the state and society against arbitrary revocations.

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[20] Constitutional law scholars have highlighted the importance of the "legitimation" or fairness function of the due process clause. "To perform its dispute-resolution function effectively, American criminal procedure must provide a mechanism that settles the conflict in a manner that induces community respect for the fairness of its processes as well as the reliability of its outcomes." Arenella, *Rethinking the Functions of Criminal Procedure: the Warren and Burger Courts' Competing Ideologies*, 72 GEO. L. REV. 185, 202 (1983).

2. A Probationer's Liberty Interest Corresponds To The High Statistical Probability That He Or She Will Successfully Complete The Probation Term.

The strength of a probationer's liberty interest should be measured by the statistical probability that he or she will successfully complete the probation term. Because Romano's success probabilities were very high, the risk of an unnecessary revocation was also very high. Judge Whipple was, therefore, constitutionally required to consider alternatives to incarceration before deciding to revoke Romano's probation.[21]

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[21] Probationers have a very high statistical success rate for all offense groups within the federal system: 82.4% in 1980; 81.3% in 1981; 82.3% in 1982; and 81.4% in 1983. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS at 545 (1980), at 539 (1981), at 416-17 (1982), at 416-17 (1983) [hereinafter cited as ANNUAL REPORTS].

A 1977 Missouri study of individuals placed on probation between 1970 and 1972 indicates a 78% success rate. M. Munson, Probation Performance on Assignments to the Missouri Board of Probation and Parole, 1970-1972 (1977). Romano's Eighth Circuit Br., Addendum H (lodged with this Court). A 1983 Missouri study of individuals placed on probation between 1972 and 1974 indicates a 79-80% success rate. J. Barbour, A. Sapp, R. Holden, Offender Performance and Characteristics: Missouri Adult Probation, 1972-74 (Executive Summary) (August 1983). Romano's Eighth Circuit Br. at Addendum I (lodged with this Court) [hereinafter cited as Missouri Adult Probation].

The empirical data also reflect that courts generally continue probation despite the probationer's commission of a minor offense. A "minor offense" is defined as "drunk[eness], disorderly [conduct], petty theft, traffic violation, etc. when sentence is 90 days or less imprisonment, or 1 year or less probation, or a fine." ANNUAL REPORTS, *supra*. Romano's careless driving conviction would fall into the "minor offense" classification. According to the federal statistics, the percentage of probations revoked for "minor" offenses was 2.0% in 1980; 1.8% in 1981; 1.4% in 1982; and 1.5% in 1983.

3. Trial Courts Which Order Incarceration By Precipitously Revoking Probation Will Increase The Likelihood That The Probationer Will Become a Recidivist.

Sociological studies support the view that incarcerated individuals have a higher recidivism rate than probationers who have never been incarcerated. ABA STANDARDS, *supra* Standard 18-2.3, Commentary at 18-76 (citing sociological studies). *See also Corrections*, *supra* at 28. Moreover, some experts maintain that prison is criminogenic, increasing an inmate's probability of recidivism. *Id.* at n.8.[22] This Court should consider this empirical data in balancing the due process interests at stake in the case at bar.

4. The High Costs of Incarceration And Overcrowded Prisons Reflect The State And Society's Interest In Requiring Judges To Carefully Consider Alternatives To Incarceration Before Revoking Probation.

The average annual cost in 1983 of incarcerating one adult prisoner was $13,000 in a federal prison and $5,000 to $23,000 in a state prison. These costs should be com-

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ANNUAL REPORTS, *supra*. A 1983 Missouri study found that 19.3% of the probationers who successfully completed their probation terms had been continued on probation despite a violation or minor conviction. Missouri Adult Probation, *supra*.

This empirical evidence signifies the strength of Romano's liberty interest. It also reflects the need for this Court to require the necessary due process procedures to protect Romano's liberty.

[22] In *United States* v. *Murray*, 275 U.S. 347, 357 (1928), this Court observed that a salutary aspect of probation is to give "young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment."

pared with the average annual cost in 1983 to supervise one adult prisoner on federal probation or parole ($1,300) or state probation and parole ($220 to $1,700). BUREAU OF JUSTICE STATISTICS, PUB. NO. NCJ-87068, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 92 (1983) [hereinafter cited as REPORT ON CRIME AND JUSTICE]. Some authorities have estimated that incarceration is ten times more expensive per inmate to administer than probation. A. Campbell, *Law of Sentencing* 74 (1978) (cited in *Probation and Parole, supra* at 11); *see also United States* v. *Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978) (court must evaluate the costs of imprisonment vs. costs of probation).

The cost of imprisonment is exacerbated in light of prison overcrowding. The ABA has observed that "[p]risons operate in excess of their capabilities and in many cases close to the limits tolerated by the Eighth Amendment." ABA STANDARDS, *supra* Standard 18-2.3, Commentary at 18-77 to 78. Recent empirical data support the ABA's conclusion. BUREAU OF JUSTICE STATISTICS BULLETIN, PUB. NO. NCJ-92949, PRISONERS IN 1983, (April, 1984)[23] [hereinafter PRISONERS].

The state and society have a great incentive to limit the staggering fiscal and social costs of unnecessary imprisonment. Due process procedures must ensure that judges do not arbitrarily revoke probation.

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[23] The Bureau of Justice Statistics evidenced the problem of prison overcrowding with the following statistics for 1983: "[T]he entire prison system in seven States (and all male penal facilities in one additional State) were operating under court order; and . . . State and Federal prison systems reported that, on the average, they were operating at about 110% of capacity."

PRISONERS, *supra* at 8.

5. Petitioners Cannot Substantiate Their Claims That The Requirement To Consider Alternatives To Incarceration Before Revoking Probation Will Overburden The State Courts, Cause An Increase In Habeas Petitions, Or Create A Conflict Between The State And Federal Governments.

Petitioners, and the *amici curiae*, complain that requiring trial judges to consider alternatives to incarceration before revoking probation would impose an unfair burden on the state courts. Br. at 10, 25-28; *amici curiae* Br. at 2-5. Petitioners and the *amici curiae*, however, cannot justify their vague and unsubstantiated objections as they overlook the prevailing norm. *See supra* Section I(B).

Justice Marshall has observed that "it is not burdensome to give reasons when reasons exist." *Board of Regents* v. *Roth*, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting). The sentencing court's explanation of alternatives to incarceration will safeguard the probationer's strong liberty interest and also protect the state and society's interest that probation should not be revoked "because of an erroneous evaluation of the need to revoke." *Morrissey*, 408 U.S. at 484.

Petitioners and the *amici curiae* also criticize the alternatives requirement by raising the spectre of federalism. Br. at 10, 25-28, *amici curiae*, Br. at 2-6. But the issues here are fairness and justice, not federalism. The federal and state courts share equal obligations to comply with due process. *See Paul* v. *Davis*, 424 U.S. 693, 702 n.3 (1976) ("[s]urely the Fourteenth Amendment imposes no more stringent requirements upon state officials than does the Fifth upon their federal counterparts.")

Petitioners express unwarranted fears that the federal courts will begin "second guessing" the state court's con-

sideration of alternatives to incarceration. Br. at 27. On the contrary, the Eighth Circuit's decision in *Romano* merely held that trial judges must *consider* alternatives to incarceration. P.A. at 20, 51, 753 F.2d at 323, 567 F. Supp. at 887. If a trial court makes a reasoned explanation of its rejection of alternatives, its decision should be upheld.

Petitioners also erroneously claim that if this Court affirms *Romano*, the state and federal courts will receive an avalanche of habeas petitions. Br. at 27-28. This Court decided *Gagnon* almost twelve years ago. The courts have experienced little difficulty in handling the relatively few petitions raising due process objections to probation revocation hearings.

6. If This Court Does Not Affirm Romano, Trial Courts May Begin To Revoke Probations For Any Violation, Jeopardizing The Future Of The Probation System.

Probation is the most frequently ordered correctional disposition in the United States. REPORT ON CRIME AND JUSTICE, *supra* at 73. At the conclusion of 1983, 1,502,247 adults in this country were probationers. BUREAU OF JUSTICE STATISTICS BULLETIN, PUB. NO. NCJ-94776, PROBATION AND PAROLE 1983 at 1 (September, 1984).

If judges automatically revoked probation for any violation, the probation system would not survive. Countless individuals would be unnecessarily incarcerated, creating a serious social and fiscal crisis. This Court must, therefore, continue to require due process protections for revocation proceedings to safeguard the integrity of the probation system.

F. Trial Courts Should Consider Alternatives To Incarceration Before Revoking Probation Unless The Conduct Which Constitutes The Probation Violation Compels The Court To Conclude That The Probationer Can No Longer Be Rehabilitated Or Supervised In The Community.

After balancing the interests of the probationer, state, and society, this Court may construct a due process test to safeguard against unfairness in the trial judge's probation revocation decision. *Bearden* suggests that a court need not consider alternatives to incarceration for all probation violations. Thus, if an indigent probationer willfully refuses to make the required restitution, a court may revoke probation without considering alternatives to incarceration. 461 U.S. at 672. *Bearden*'s holding, however, is limited to its facts. *Id.*

The Eighth Circuit in *Romano* similarly opined that it "did not intend any rigid formula for determining what constitutes adequate consideration of alternatives to incarceration, but instead anticipated case-by-case analyses." P.A. at 15-16, 735 F.2d at 322. The Missouri Supreme Court followed the same logic when it implied that the trial court's failure to consider alternatives to incarceration may be harmless if the "alleged violation was [a] commission of a major crime or a crime similar to that for which the probationer was originally convicted. . . ." *Abel*, 574 S.W.2d at 417.

Romano gives this Court the opportunity to define the limits of its holdings in *Morrissey* and *Gagnon* by offering guidance to trial courts as to their duty to consider alternatives to incarceration. Respondent respectfully proposes the following rule of law, based on the policies underlying probation, which will prevent trial courts from arbitrarily revoking probation.

> A judge or hearing officer must make a reasoned explanation on the record of the viability of alterna-

> tives to incarceration before revoking probation[24] for all probation violations unless the conduct which constitutes the probation violation, viewed in the context of the probationer's underlying crime and the conditions of probation, compels the court or hearing officer to conclude that the probationer can no longer be rehabilitated or supervised in the community and that the state's interests in punishment and deterrence require the probationer to be incarcerated.[25]

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[24] Alternatives to incarceration may only require continuation of the probation term without additional conditions but may also include additional conditions to the probation agreement which relate to the conduct involved in the probation violation. *See supra* n.15.

[25] If this Court wishes to emphasize the requirement that the trial judge state "reasons" rather than "alternatives," it is respectfully submitted that this Court may adopt an alternative rule of law:

> Before revoking probation, a judge or hearing officer must make a reasoned explanation on the record as to whether the conduct which constitutes the probation violation indicates that the probationer can no longer be rehabilitated or supervised in the community and must, therefore, be incarcerated. The judge or hearing officer, however, need not explain on the record his or her reasons for revoking probation if the conduct which constitutes the probation violation, viewed in the context of the probationer's underlying crime and conditions of probation, compels the judge or hearing officer to conclude that the probationer can no longer be rehabilitated or supervised in the community and that the state's interest in punishment and deterrence requires the probationer to be incarcerated.

This Court may offer clearer guidance to trial courts by requiring that alternatives to incarceration be considered for *all* probation violations. Adopting the harmless/prejudicial error standard of review will protect the state when a court does not consider alternatives in a case where incarceration is the only viable alternative. *See Chapman* v. *California*, 386 U.S. 18 (1967) (adopting the harmless/prejudicial error standard of review for constitutional errors); *Kartman* v. *Parratt*, 535 F.2d 450, 457-58 (8th Cir. 1976) (harmless/prejudicial error rule applied to cure constitutional error probation revocation proceeding). Respondent respectfully proposes the following rule of law which incorporates the harmless/prejudicial standard:

> A judge or hearing officer must consider on the record alternatives to incarceration before revoking probation for all probation

Cf. Romano, P.A. at 21, 735 F.2d at 323 ("the facts *do not compel* a conclusion that Romano's effort at rehabilitation had failed or that he represented a danger to himself or to society.") (emphasis added).

Applying this rule to the case at bar, this Court should conclude that Judge Whipple had a duty to consider alternatives to incarceration before revoking Romano's probation. The conduct which constituted Romano's probation violation did not reflect that Romano represented a danger to the community or that he had acquired an antisocial personality and must, therefore, be incarcerated for twenty years. Romano's conduct did not compel the conclusion that he could no longer be rehabilitated or supervised in the community.

The trial court should focus on the *conduct* constituting the probation violation and disregard the state's decision to convert the violation into a "crime."[26] Probation viola-

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violations. If the judge or hearing officer fails to consider alternatives, the decision may be reviewed under the harmless/prejudicial error standard of review. The failure to consider alternatives to incarceration is harmless if the state can prove that the conduct which constituted the probation violation, viewed in the context of the probationer's underlying crime and the conditions of probation, compelled the court or hearing officer to conclude that the probationer could no longer be rehabilitated or supervised in the community and that the state's interests in punishment and deterrence required the probationer to be incarcerated.

Under *Bearden*, prejudicial error only exists if the court revokes probation without considering alternatives to incarceration for a probationer who is too indigent to make the required restitution.

[26] The state ultimately punished Romano for his "criminal" conduct by convicting him of careless driving and fining him $100. Judge Whipple's revocation decision should not represent additional punishment for Romano's driving offense. As one expert has observed, "[i]f the probationer's violation is a new crime, it is illogical . . . to impose additional punishment (imprisonment) for the original crime, which is not made any more reprehensible by the later crime." *Clarke*, *supra* at 413.

tions include criminal and non-criminal (or technical) offenses. Technical offenses may, in some instances, create a stronger basis for revocation and incarceration than minor criminal offenses. For example, a probationer who absconds from supervision reflects a greater inability to rehabilitate in the community than a probationer, like Romano, who carelessly drives an automobile. Judge Whipple's characterization of Romano's conduct as constituting the crime of leaving the scene of an accident was, therefore, irrelevant to his revocation decision.

G. Alternatives To Incarceration Should Be Considered In Administrative And Judicial Probation Revocation Proceedings.

Due process requires that alternatives to incarceration be considered in both administrative and judicial probation revocation proceedings. *Morrissey* and *Gagnon* require the consideration of alternatives in administrative revocation hearings. *Bearden* requires the consideration of alternatives in a judicial revocation proceeding. *Cf. Kent* v. *United States*, 383 U.S. 541 (1966) (due process requires juvenile court judges to make a written statement of reasons before waiving jurisdiction); *Moore* v. *Stamps*, 507 S.W.2d 939, 950 (Mo. Ct. App. 1974) (*en banc*) (in applying *Gagnon's* due process requirements to Missouri's judicial probation revocation procedures, the court held that the judge must make a "written statement . . . [of] the reasons for revoking probation.") A court is better able than an administrative body to comply with a procedural rule requiring written findings. An anomalous result would occur, therefore, if this Court accepted petitioners' suggestion, Br. at 22-23, that due process does

not require a court to consider alternatives in a probation revocation proceeding.[27]

H. Sentencing And Probation Revocation Proceedings Are Constitutionally Distinguishable And Involve Different Factual Issues.

Petitioners erroneously equate sentencing and probation revocation proceedings. Br. at 21-25. The proceedings are constitutionally distinguishable and involve different factual issues.

A criminal conviction constitutionally deprives an individual of his liberty. *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976). A judge, therefore, need not follow a prescribed set of procedural due process rules in a sentencing hearing. By granting probation to a convicted defendant, however, the court restores to the defendant conditional liberty which is protected by due process. *Bearden*, 660 U.S. at 670-71; *Gagnon*, 411 U.S. at 662. A trial court must, therefore, comply with due process, which includes the duty to consider alternatives to incarceration, before revoking a probationer's "significant" liberty interest. *Id.*

Sentencing and probation revocation proceedings also involve different factual inquiries. A judge considers numerous factors before deciding on the appropriate sentence. *See, e.g.*, Br. at 25, n.4 (list of eleven factors) (citing *Probation and Parole* at Sections 2.06-2.27). A judge who

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[27] Petitioners argue that judges, as distinguished from administrative hearing officers, need not consider alternatives in a revocation proceeding because they have already considered alternatives at the sentencing hearing. Even if one assumes that the sentencing judge will always preside over the revocation proceeding, petitioners' logic is faulty. Petitioners erroneously equate the sentencing and revocation decisions which have significantly different legal and factual characteristics. *See infra* § H.

presides at a revocation hearing, however, only decides the issue of whether the probation violation indicates that the probationer can no longer be rehabilitated or supervised in the community and must, therefore, be incarcerated. Contrary to petitioners' suggestion, Br. at 24-25, the revocation judge does not consider the myriad factors involved in the initial sentencing decision.

Reasons are a bulwark against arbitrariness. The due process requirement that a judge consider the principles underlying probation and the viability of alternatives to incarceration guarantee that the decisionmaking process is not based on purely subjective considerations.

I. The Requirement That A Judge Consider Alternatives To Incarceration Should Be Distinguished From The Probationer's Duty To Present Mitigating Evidence.

Contrary to petitioners' assertions, Br. at 19-20, the trial court has the duty to consider alternatives to incarceration, while the probationer (or his attorney) has the duty to present mitigating evidence at a revocation hearing. *Gagnon* discussed alternatives to incarceration in the context of what a court must consider in its decisionmaking process. 411 U.S. at 784-86. *See also Bearden*, 461 U.S. at 673 n.12. ("[T]he *sentencing court* must focus . . . in probation revocation hearings . . . [on] whether non-imprisonment alternatives are adequate. . . .") (emphasis added). On the other hand, *Gagnon* discussed the probationer's right to present mitigating evidence in the context of whether the probationer had a right to appointed counsel. 411 U.S. at 787, 790.

In the case at bar, Romano's attorneys presented the substantial mitigating evidence surrounding his probation violation. Judge Whipple had a duty to evaluate his evidence in determining whether alternatives to incarceration were appropriate. In *Romano*, as in most

revocation hearings, the alternatives were obvious and counsel would not have assisted the court by presenting evidence of their existence.

J. Notwithstanding The Requirement To Consider Alternatives To Incarceration, Judge Whipple Abused His Discretion In Revoking Romano's Probation And Executing A Twenty Year Prison Sentence.

Even if one assumes that a trial court has no constitutional duty to consider alternatives to incarceration, *Romano* should still be affirmed. In *Burns* v. *United States*, 287 U.S. 216, 222-23 (1932),[28] this Court applied the "abuse of discretion" standard of review to probation revocation proceedings. Judge Whipple abused his discretion by arbitrarily revoking Romano's probation and imposing a twenty year prison sentence because:

(1) the conduct which constituted the probation violation had no rational relationship to Romano's marijuana conviction and special conditions of probation; and

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[28] The *Burns* Court stated that judicial discretion "implies conscientious judgment, not arbitrary action . . . [and] takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result,' " 287 U.S. at 222-23. The "abuse of discretion" standard of review is based on the fourteenth amendment's guarantee of fundamental fairness under the due process clause. *See Wolff* v. *McDonnell*, 418 U.S. at 558.

This Court has overturned probation and parole revocation decisions based on the kind of tenuous evidentiary support which exists in the case at bar. *See, e.g., Douglas* v. *Buder*, 412 U.S. 430 (1973) (*per curiam*) (probation revocation based on traffic offense was "totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment"); *Arciniega* v. *Freeman*, 404 U.S. 4 (1971) (*per curiam*) (reversal of parole revocation for not constituting "satisfactory evidence" of a parole violation based on parolee's association with other ex-convicts at place of employment).

(2) Judge Whipple failed to consider the substantial mitigating evidence involved in Romano's probation violation.

Judge Whipple ignored substantial mitigating evidence which indicated that he should not have revoked Romano's probation. Romano had not committed any serious criminal violation for the twenty eight month period between his arrest and his sentencing hearing. More importantly, Romano's post-accident behavior indicated that he did not intend to avoid responsibility for his conduct relating to the traffic accident.

K. The District Court And The Eighth Circuit Applied The Correct Standard Of Review And Properly Decided Not To Order An Evidentiary Hearing To Give The Missouri Trial Judge An Opportunity To Supplement The Record And Cure The Constitutional Errors In His Decision To Revoke Probation.

To support their federalism bogeyman, petitioners contend the lower courts improperly "shifted the burden of proof" to petitioners. Br. at 28-34. The record and opinions below do not support petitioners' illusory argument.

Neither the district court nor the Eighth Circuit intruded upon Judge Whipple's factual findings.[29] Indeed, both lower courts accepted as true Judge Whipple's questionable finding that Romano was the driver of the automobile which struck Bradley. P.A. at 6, 43, 735 F.2d at 320, 567 F. Supp. at 885. The lower courts held, however,

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[29] The Eighth Circuit exhibited great deference to the Missouri courts by dismissing without prejudice Romano's first federal habeas claim because Romano failed to exhaust his state remedies. *Romano* v. *Wyrick*, 681 F.2d 555, 556 (8th Cir. 1982). Despite the Eighth Circuit's opinion, the Missouri Supreme Court refused to hear Romano's meritorious claims. R. at 79-80.

that Judge Whipple's failure to consider alternatives to incarceration violated due process. P.A. at 20-23, 47-48, 735 F.2d at 323, 567 F. Supp at 886.

Petitioners misunderstand the plain language of 28 U.S.C. Section 2254(d). The federal courts have no statutory obligation to defer to Judge Whipple's decision for two reasons:

(1) Judge Whipple made no factual findings as to the viability of alternatives to incarceration before revoking Romano's probation. 28 U.S.C. Section 2254(d)(1), (2), (3), (6), and (8); and

(2) The question of whether Judge Whipple should have given Romano an alternative to incarceration is a question involving Romano's due process rights, concerning which no deference need be given to the state court's finding. 28 U.S.C. Section 2254(d)(7).

Even if one were to consider that the question of alternatives to incarceration is a mixed question of law and fact, this Court has held that such questions may be reviewed independently under 28 U.S.C. Section 2254. *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982).

Petitioners further argue that the district court should have held an evidentiary hearing to determine if Judge Whipple mentally considered alternatives to incarceration before revoking Romano's probation. Br. at 28-30. Petitioners cannot support this argument with any authority. Petitioners have conceded that the probation revocation transcript reflects that Judge Whipple failed to give even the slightest attention to alternatives to incarceration on the record. Petitioners' Eighth Circuit Br. at 1-2 (lodged with this Court). A fundamental and axiomatic principle of appellate jurisdiction is that a trial judge may not supplement an extensive record to cure errors after he has relinquished jurisdiction over the case.

II. THE DISTRICT COURT AND THE EIGHTH CIRCUIT WERE CORRECT IN ORDERING RESPONDENT RELEASED FROM ALL CUSTODY AND IN NOT ALLOWING PETITIONERS TO HOLD A NEW, RETROSPECTIVE PROBATION REVOCATION HEARING, AFTER RESPONDENT'S PROBATION TERM HAS ALREADY EXPIRED UNDER MISSOURI LAW, TO CURE A CONSTITUTIONAL DEFECT THAT OCCURRED IN RESPONDENT'S PROBATION REVOCATION HEARING ALMOST EIGHT YEARS AGO.

A. Missouri Law Supports The Lower Courts' Orders Releasing Romano From All Further Custody.

After finding that Romano's probation revocation hearing was unconstitutional, the district court and Eighth Circuit were correct in ordering Romano's unconditional release from all further custody. Inasmuch as Judge Whipple's probation revocation order was unconstitutional, and, therefore, a nullity, Romano's five year probation term,[30] which commenced on April 13, 1977, expired on April 13, 1982. The State of Missouri no longer has the jurisdiction or custody over Romano's person necessary to conduct a new revocation hearing. The lower courts, therefore, were required to order his release.

The applicable Missouri statute requires Romano's release from custody upon the expiration of his probation term. Mo. Rev. Stat. Section 549.111.1 (1963, as amended 1967) (repealed by L. 1977, at 658, eff. Jan. 1, 1979) (the applicable law at the time of Romano's revocation hearing), states that when a probationer has successfully completed his probation term, "[h]e shall automatically be

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[30] Petitioners erroneously contend, contrary to the record and Missouri law, that Judge Whipple placed Romano on a ten year probation. *See supra* note 1.

absolutely discharged from the probation and from the supervision of the Board of Probation and Parole. . . ." Romano successfully completed his probation term in jail. He must, therefore, be released as provided by Missouri law.[31]

Several state courts, addressing the precise remedial issue which the court below decided, have held that a state may *not* hold a new probation revocation hearing to cure a procedural defect in a former hearing after an individual's probation term has already expired. *People* v. *Amsbary*, 51 Cal. App.3d 75, 78-79 (1975); *Cook* v. *Commonwealth*, 176 S.E.2d 815, 818 (Va. 1970); *State ex rel. Strickland* v. *Melton*, 165 S.E.2d 90, 97 (W.Va. 1968); *Haney* v. *Eyman*, 399 P.2d 905, 907 (Ariz. 1965) (*en banc*).

B. Due Process Prevents The Missouri Courts From Holding A Retrospective Probation Revocation Hearing To Consider Events Which Occurred Almost Eight Years Ago.

Morrissey held that due process requires that "[t]he revocation hearing must be tendered within a reasonable time after the parolee is taken into custody." 408 U.S. at 488. In holding that a two month delay was acceptable, *id.*, this Court implied that a delay of multiple years would be unacceptable. Lower courts have also evaluated the permissible length of the delay in holding a revocation

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[31] Respondent presented to the lower courts the arguments relating to his remedial rights under Missouri law. This Court has deferred to the lower courts' interpretation of state law questions. *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979) ("The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local counsel would dispose of comparable issues.").

hearing in terms of months. *See, e.g., Marchand* v. *Director, U.S. Probation Office*, 421 F.2d 331, 335 n.5 (1st Cir. 1970) (courts will not tolerate a delay which exceeds three months).

In discussing the sixth amendment right to a speedy trial, this Court held that judges must balance four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972). If the *Barker* test is applied to the case at bar, Romano should be released. *See United States ex rel. Sims* v. *Sieloff*, 563 F.2d 821, 828 (7th Cir. 1977) (*Barker's* test for sixth amendment prejudicial delay should be applied to evaluate delay in parole revocation proceedings).

First, Romano aggressively asserted his post-conviction rights. Romano filed his first *pro se* motion for relief with the Missouri courts on March 28, 1980. The Missouri courts had more than two years in which to cure the errors in Romano's original probation revocation hearing. But the record reflects that Romano was bounced around for years in the Missouri courts which denied all of Romano's petitions. None of the Missouri courts—at the trial, appellate, or Supreme Court levels—even once considered the merits of Romano's case.

Second, the state caused the delay in the adjudication of Romano's claims. On July 14, 1980, Romano filed a state habeas petition which alleged that Judge Whipple failed to consider alternatives to incarceration before revoking Romano's probation. R. at 58-62. Petitioners concede that a Missouri trial judge not only denied Romano's petition on improper procedural grounds, but also directed Romano to file a procedurally inappropriate post-conviction relief motion. Pet. at 3. This single mistake cost Romano almost three years of his life in the Missouri penitentiaries.

Finally, the eight year delay has significantly prejudiced Romano. The *Barker* Court identified three factors which constitute "prejudice" to the defendant: (1) "oppressive incarceration"; (2) "anxiety and concern"; and (3) "the possibility that the defense will be impaired." 407 U.S. at 532.

One cannot possibly express the oppression, anxiety, and sheer horror which Romano experienced during his five and one-half years of unconstitutional confinement in Missouri's most dangerous penitentiaries. The Eighth Circuit and the district court properly refused "to blind [themselves] to the time Romano had served in the custody of the State of Missouri." P.A. at 25, 735 F.2d at 324.

Romano's defense will also be impaired if he is required to undergo a retrospective probation revocation hearing. Romano's alleged probation violation occurred almost eight years ago. It would be impractical and unfair to allow the State of Missouri an opportunity to conduct a retrospective hearing. The trial court can only fairly consider the question of alternatives to incarceration in the context of the fresh facts and mitigating circumstances surrounding the probation violation. A gross injustice would result if this Court allows the Missouri trial court to consider alternatives to incarceration for Romano in a historical vacuum. *Cf. Drope* v. *Missouri*, 420 U.S. 162, 183 (1975) (due process precludes retrospective hearing to evaluate defendant's mental competency for trial which occurred six years earlier).[32]

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[32] If a court finds that the probation or parole board made an arbitrary revocation decision, it may also refuse to allow the state to conduct a new hearing. *See, e.g., Caton* v. *Smith*, 486 F.2d 733, 736 (7th Cir. 1973).

Petitioners argue that Romano's time of incarceration should not satisfy Romano's probation obligation. Br. at 37. District Judge Cahill observed that "the rigors and stress associated with imprisonment are far greater than those on probation." P.A. at 53, 567 F. Supp. at 887. This Court has also observed that an individual may serve his probation term in jail. *Burns* v. *United States*, 287 U.S. 216, 223 (1932).

In *Iasigi* v. *Van De Carr*, 166 U.S. 391 (1897) (cited by *Romano*, P.A. at 26, 735 F.2d at 324), this Court noted that the federal courts may exercise "discretion" "as law and justice require" in deciding upon a proper habeas remedy. 166 U.S. at 393, 395. The current habeas statute embodies the same policies expressing in *Iasigi*. The federal habeas statute allows a federal court broad discretion in fashioning a remedy under a writ of habeas corpus. "[T]he Court shall . . . dispose of the matter as law and justice require." 28 U.S.C. Section 2243. Justice requires the State of Missouri to release Romano from all further custody.

CONCLUSION

This Court should affirm the decisions of the district court and the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

Relevant Missouri Statutory Authorities

Mo. Rev. Stat. § 559.012 (1978)

Eligible for probation, when.

The court may place a person on probation for a specific period upon conviction of any offense or upon suspending imposition of sentence if, having regard to the nature and circumstances of the offense and to the history and character of the defendant, the court is of the opinion that

(1) Institutional confinement of the defendant is not necessary for the protection of the public; and

(2) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision.

Mo. Rev. Stat. § 549.071.1 (1963, as amended 1967) repealed by L. 1982, at 438, § A.

Parole and probation may be granted, when—terms, length of—extensions.

1. When any person of previous good character is convicted of any crime and commitment to the state department of corrections or other confinement or fine is assessed as the punishment therefor, the court before whom the conviction was had, if satisfied that the defendant, if permitted to go at large, would not again violate the law, may in its discretion, by order of record, suspend the imposition of sentence or may pronounce sentence and suspend the execution thereof and may also place the defendant on probation upon such conditions as the court sees fit to impose. The probation shall be for a specific term which shall be stipulated in the order of record. In the case of a felony offense no probation under this chapter shall be granted for a term of less than one year, and no probation shall be granted for a term of longer than five years. In the case of a misdemeanor offense no probation shall be

granted for a term of longer than two years. The court may extend the term of probation, but no more than one extension of any probation may be ordered.

Mo. Rev. Stat. § 549.101.1 (1963, as amended 1965) repealed by L. 1977, at 658, § 1, eff. Jan. 1, 1979

Arrest of person on probation or parole—revocation of probation or parole—costs—second probation or parole.

1. The court granting probation or parole may at any time before order of discharge without notice to the defendant order his apprehension by the issuance of a warrant for his arrest and his appearance in court forthwith. Any probation or parole officer assigned to or serving the court or judge having jurisdiction may arrest such defendant without a warrant, or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the defendant has, in the judgment of the probation officer, violated the conditions of his probation. The written statement delivered with the defendant by the arresting officer to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the defendant. After making an arrest the probation officer shall present to the detaining authorities a similar statement of the circumstances of violation. The court may in its discretion, with or without hearing, order the probation or parole revoked and direct that the sentence theretofore imposed be commenced and order execution thereof or in the event imposition of sentence was suspended the court may pronounce sentence and order execution thereof. The court may in its discretion order the continuance of the probation or parole upon such conditions as the court may prescribe. The court in its discretion may order the allowance in mitigation of the sentence credit for all or for part of the time defendant was upon probation or parole.

2. After the probation or parole has been revoked, as provided in subsection 1, the court may in its discretion require the payment of all costs in the case and may grant a second probation or parole, but no more than two probations or paroles shall be granted the same person under the same judgment or conviction.

Mo. Rev. Stat. § 549.111.1 (1963, as amended 1967) repealed by L. 1977, p. 658, § 1, eff. Jan. 1, 1979.

Absolute discharge of person on probation or parole—citizenship restored—order of discharge to indicate restoration of rights.

1. When a defendant who has been placed upon probation or parole for the term prescribed by the court, and the court granting the probation or parole is satisfied that the reformation of the defendant is complete and that he will not again violate the law, the court shall, by order of record, grant his absolute discharge. When a defendant has completed the term of probation prescribed by the court, if the original order of probation has not been amended, modified, extended or revoked by the court, he shall automatically be absolutely discharged from the probation and from the supervision of the board of probation and parole and the court shall so note by order of record. The order operates as a complete satisfaction of the original judgment by which the fine or jail sentence or commitment to the state department of corrections was imposed or suspended.

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No. 84-465

In the Supreme Court of the United States

OCTOBER TERM, 1984

DR. LEE ROY BLACK, Director of the Missouri Department of Corrections and Human Resources; DICK D. MOORE, Chairman, Missouri Board of Probation and Parole,

Petitioners,

vs.

NICHOLAS J. ROMANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

The brief of respondent is disturbingly replete with inaccuracies and misstatements, both factual and legal. Additionally, respondent improperly proffers "evidence" to this Court which was not before the District Court below, and persistently disregards the statutory and decisional law concerning federal habeas corpus review of state court factual findings. Since these factual misstatements are uniformly self-serving to respondent, and since many of them have no bearing upon the legal issues before this Court, it is inferable that respondent is attempting to misrepresent the equities in this case by implying that injustice has been done to him when no such injustice ex-

ists. To counter that implication, and to show the lack of merit in respondent's constitutional analysis, the petitioners must refute in detail respondent's version of the relevant facts.

I. RESPONDENT'S ACCOUNT OF THE FACTS

A. The Plea of Guilty and Sentencing Proceedings

In the eight years since respondent's plea of guilty to the transfer and sale of controlled substances, he has advanced no legal challenge whatsoever, in state or federal court, to the validity of the guilty plea proceeding.[1] Nor is such a challenge an element of the federal habeas corpus petition at bar. Nevertheless, respondent devotes a substantial part of his Statement of the Case to attacking the fairness of this proceeding and impugning the wisdom of the presiding judge, particularly as to the decision on sentencing (Resp.Br. 4-6).

The timing of respondent's attack is most convenient from his point of view. Because the initial sentencing decision is not legally at issue in the present habeas corpus action, and further because respondent successfully opposed an evidentiary hearing in which the state Circuit Judge might have testified on this subject, this Court lacks access to some of the information known to the sentencing judge concerning the respondent, and the precise factors that went into the sentencing decision are a matter of conjecture from an incomplete record. For example, the

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1. Under Missouri law, defendants who are convicted or plead guilty can independently challenge the sentence imposed on the ground that it was excessive in light of the crime, where (as respondent claims to be the case here; Resp.Br. 5-6) it is alleged that the sentence was the product of prejudice by the sentencing judge. *Hill v. State*, 543 S.W.2d 809 (Mo.App. 1976); *Abell v. State*, 606 S.W.2d 198 (Mo.App. 1980).

original presentence investigation filed with the state court, which expressly opposed the granting of probation (see J.A. 33, 43), was never presented as an exhibit in the District Court below, and the information contained in it is thus not a matter of record.[2] Respondent's belated efforts to call into question the fairness of the sentence he received should be summarily rejected on this basis.

Even given the facts available, respondent's current attack is a travesty. The record is utterly undisputed that respondent was no mere possessor or small-scale seller of illegal drugs; he was apprehended while conveying *26 pounds* of marijuana, in handy one-pound packages, in exchange for heroin (J.A. 27-28, 36-37, 40).[3] The Circuit Court was perfectly justified in concluding, from respondent's prior conviction of marijuana possession and a relatively recent marijuana arrest (plus whatever information was present in the presentence investigations) that respondent was anything but a novice in the sale of illegal drugs (J.A. 25-26, 38-39).[4] Respondent's assertion that

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2. Respondent has lodged with this Court a document entitled "Addendum A," which purports to be a supplemental presentence investigation prepared in the case. Respondent omits to note that this document was never presented to the District Court, whose decision is currently under review. It would seem that respondent desires the best of both worlds: to prevent the introduction of testimony by petitioners while at the same time holding his own *ex parte* "hearing" on appeal by the presentation of new evidence which is not subject to challenge, cross-examination or reply. This attempt is manifestly improper and impermissible. *Rebuck v. Vogel*, 713 F.2d 484, 486 (8th Cir. 1983); see Rule 10(a), Federal Rules of Appellate Procedure.

3. Peculiar indeed is respondent's assertion that, because the "heroin" given to him by the undercover police officer in exchange for the marijuana was not actually heroin, this somehow mitigates his criminal offense (Resp.Br. 4).

4. Respondent cannot, as he attempts (Resp.Br. 4), limit the facts before the sentencing judge to prior convictions. See *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983), which summarizes federal law and procedures on this subject.

he "may have had a meritorious entrapment defense" to the charge (Resp.Br. 4) rests solely upon various self-serving assertions he made while admitting guilt (J.A. 15-16). The sentencing court was entitled to note that respondent was preventing a hearing on this "entrapment" claim by pleading guilty, and further that respondent had exhibited a pattern of consistently denying responsibility for criminal conduct (see J.A. 26). In short, the record establishes that respondent had committed a major criminal offense and that his "past track record [was] not too good" (J.A. 43). The court could have sentenced respondent to an unlimited term of years or life imprisonment (J.A. 12), and much higher sentences have been imposed for similar crimes. See, e.g., *Abell v. State, supra* at 199. Instead, the sentencing judge imposed concurrent twenty-year sentences and, heeding respondent's plea for "alternatives to incarceration," suspended the execution of this sentence and placed respondent on closely-supervised probation for five years with the stated intention of extending probation another five years when the first term had expired (J.A. 42-47).[5] Under the record before this Court, the sentence imposed upon respondent was both reasonable and consistent with the facts.

B. The Probation Revocation Proceeding

While scoffing at petitioners' concern for the principles of federal-state comity (Resp.Br. 30, 39-40), respondent occupies fully half of his Statement of the Case in

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5. Contrary to footnote 1 of respondent's brief (Resp.Br. 2), this is precisely what was said by petitioners in their original brief (Petitioners' Brief 3, 37). Respondent's apparent implication in this footnote that the sentencing judge was precluded by Missouri law from imposing a second probation term is flatly refuted by *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710, 715 (Mo. banc 1977).

requesting that this Court re-weigh the credibility of the witnesses who testified at the probation revocation hearing (J.A. 49-98), and concerning which the state judge issued written findings of fact (J.A. 103, 107-110). Given respondent's deep faith in the essential rightness of the federal court system over the state courts on matters of state law (Resp.Br. 42, n. 31; *but see* Pet.Br. 33), this attempt is understandable. However, respondent flatly ignores the dictates of 28 U.S.C. § 2254(d) and the numerous recent decisions of this Court holding that state court factual findings will be overturned on federal habeas review only if they lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). In particular, determinations of the credibility of witnesses depend in large part upon demeanor, and as such "are peculiarly within a trial judge's province" (footnote omitted). *Wainwright v. Witt*, ... U.S. ....., 105 S.Ct. 844, 854, ... L.Ed.2d ..... (1985); see also *Patton v. Yount*, ... U.S. ....., 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847, 858 (1984). Neither the Eighth Circuit nor the District Court below saw fit to cite or apply the principles of § 2254(d) in ruling that respondent had in fact violated the terms of his probation, an omission petitioners find difficult to justify. *Romano v. Black*, 735 F.2d 319, 320-321 (8th Cir. 1984); *Romano v. Black*, 567 F.Supp. 882, 885-886 (E.D.Mo. 1983). Nevertheless, no legitimate dispute remains on this factual question.

In addition to ignoring § 2254(d), respondent disregards a number of inconvenient facts in propounding his self-serving account of events. He repeatedly cites, as if it were significant, the fact that he was later convicted of careless and imprudent driving instead of the felony of leaving the scene of an accident (Resp.Br. 10-11, 34); in his Questions Presented, he misleadingly asserts that his pro-

bation was revoked "based upon conduct for which respondent was ultimately charged and convicted of careless driving" (Resp.Br. i).[6] As respondent is well-aware, a criminal conviction on a lesser charge, or even a complete acquittal, does nothing to affect the validity of a finding, based upon a lower standard of proof, that a probationer or parolee has committed certain criminal conduct which violates the terms of his probation or parole. *Taylor v. United States Parole Commission,* 734 F.2d 1152, 1155 (6th Cir. 1984), and cases cited therein. Here, the state Circuit Judge expressly found that respondent committed the felony of leaving the scene of an accident (J.A. 103, 107-110), and the record indubitably supports this finding. That being the case, respondent cannot escape the fact that he violated his terms of probation by committing this felony.

Of no greater merit are an assortment of other factual assertions by respondent. His claim that his conduct after the accident "proved that he did not intend to escape responsibility for his actions" (Resp.Br. 10) is adequately dealt with in petitioners' original brief (Pet.Br. 32-33); all that is shown by the record is an initial difficulty on respondent's part after the accident in "getting his story straight" (J.A. 71-73, 77-79, 83, 87). Respondent's assertion that his commission of a felony "had no relationship to [his] marijuana conviction" (Resp.Br. 11) is frivolous; the "relationship" was that the former crime was a felony committed two months after respondent was granted probation for the latter crime, which strongly indicated that respondent was not a suitable candidate for

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6. Given the uncooperative attitude of two of the state's principal witnesses, both occupants of the car which struck the victim (J.A. 54-58, 66-68, 90-94, 110), the state's decision to reduce the factual showing it was required to make was neither unreasonable nor unforeseeable.

probation. The statement by respondent that he did not intend to strike Timothy Bradley with his car (Resp.Br. 23) is irrelevant even assuming its truth; respondent was not revoked for deliberately running over Bradley, but for deliberately leaving the scene of this accident in violation of law.

Most egregious of all of respondent's factual misstatements regarding the probation revocation proceeding is his allegation that "[t]he probation revocation transcript and the court's 'Memorandum of Findings,' J.A. at 107-10, reflect that Judge Whipple revoked Romano's probation without considering alternatives to incarceration" (Resp.Br. 11). Leaving aside whether such alternatives are required to be considered, discussed *infra* and in petitioners' original brief, the present record is *completely silent* as to whether Judge Whipple considered possible measures other than imprisonment. Respondent, while unwilling to concede to the state court even its determinations of credibility based upon the demeanor of the witnesses, is uncommonly eager to "assume" that alternatives to incarceration were not considered merely because nothing was said on this subject at the revocation hearing. This graphically illustrates the error and gross injustice in denying the petitioners an evidentiary hearing in this case.

C. Respondent's Exhaustion of State Remedies

Respondent gives a piteous account of the difficulties he encountered in challenging his revocation of probation in the state courts, and seeks to ascribe blame to the State of Missouri (rather than to respondent himself) for the five-year delay between his revocation and the filing of the federal habeas corpus petition at bar (Resp.

Br. 3, 43). Respondent's course through the state forum was admittedly not smooth. The record establishes that challenges by respondent to his probation revocation were dismissed on procedural grounds by Circuit Courts in two counties: the county of respondent's revocation (Laclede County) and the county of his incarceration (Cole County). The decision by the Laclede County court was correct; that of the court in Cole County was erroneous.[7]

Respondent's outrage over this error, however, is contrived, because it has virtually nothing to do with the five-year hiatus in the present case. From the time of his revocation, respondent waited almost *three years* before filing *any* challenge in any court to the revocation decision. After his improper Laclede County action was dismissed, respondent filed the correct proceeding in Cole County; *two days* later, it was dismissed. Under well-established Missouri law (including *Abel v. Wyrick, supra,* which respondent had repeatedly cited in his state pleadings), he had the absolute right to file the same habeas corpus action in the Missouri Court of Appeals or Supreme Court. However, respondent chose to ignore this fact for more than two years, and filed such an action only after he was directed to do so in an Eighth Circuit opinion. *Romano v. Wyrick,* 685 F.2d 555, 557 (8th Cir. 1982). Then and only then, only a month before the federal habeas action at bar was ultimately filed, did respondent follow the

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7. Respondent's action under Missouri Supreme Court Rule 27.26 in Laclede County was subject to dismissal because this remedy cannot be employed to challenge revocation of probation, *Smith v. State,* 517 S.W.2d 148, 150 (Mo. 1974), and because the possible venues for a state habeas corpus petition were in the county of incarceration, the Court of Appeals for that judicial district, or the Supreme Court of Missouri. See *Abel v. Wyrick,* 574 S.W.2d 411, 415 (Mo. banc 1978).

required procedure.[8] As these facts demonstrate, it is frivolous for respondent to claim that the ruling of the Cole County Circuit Court "cost Romano almost three years of his life in the Missouri penitentiaries" (Resp. Br. 43).

II. RESPONDENT'S CONSTITUTIONAL THEORIES

A. Contrary to Respondent's Argument, the Imposition or Execution of Sentence in a Probation or Parole Revocation Is Constitutionally Indistinguishable From an Imposition of Sentence at the Time of Conviction, and the Two Should Be Judged by the Same Standards

The primary fallacy in respondent's analysis is his refusal to acknowledge that no constitutionally-cognizable difference exists, or should exist, between a sentencing decision following a verdict or plea of guilty and a similar decision after a finding that the conditions of probation or parole have been violated (Resp.Br. 36-37). When Nicholas James Romano was charged with the felonies of transfer and sale of a controlled substance, he was thereby cloaked with the numerous constitutional protections afforded a person who is criminally accused including the right to counsel, fair notice of the charges against him, a qualified right to discovery, the opportunity to present evidence and confront and cross-examine the witnesses against him, a fair and impartial trier of fact, and many others. After respondent had entered his plea of guilty to

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8. Characteristically, respondent offers no support whatsoever for his flat assertion that the merits of his state habeas petition were not before the Supreme Court of Missouri (Resp.Br. 3), and no such support exists. See *Abel v. Wyrick, supra* at 415.

these offenses (or had he been convicted of them), he continued to have three species of constitutional protections at the time of sentencing. First, he was entitled to certain minimal procedural safeguards, chief among which was the right to the assistance of counsel at sentencing. *Mempa v. Rhay,* 389 U.S. 128, 134-137, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); see also *Specht v. Patterson,* 386 U.S. 605, 608-611, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (separate sentence enhancement statute cannot be applied to convicted defendant absent notice and hearing); *Gardner v. Florida,* 430 U.S. 349, 357-365, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (in capital case, cannot withhold information in presentence report from defendant). Second, the sentence imposed upon him could not rest upon false or materially erroneous information. *Roberts v. United States,* 445 U.S. 552, 556, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980). Finally, respondent's sentence could not itself suffer from some inherent constitutional defect—it could not, for example, constitute cruel and unusual punishment, *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), or unfairly single out indigents for their inability to pay a fine, *Tate v. Short,* 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971). Aside from these constitutional restrictions, however, the sentencing court was undisputedly entitled to impose *any* sentence upon Romano within the specified range of punishment, without the statement of reasons for its decision and without any *constitutional* review of the penalty assessed. All of the "alternatives to incarceration" vaunted by the District Court below, *Romano v. Black, supra,* 567 F.Supp. at 886, were available to the state court at the time of sentencing. Nevertheless, respondent makes no attempt whatever to assert, and could not legitimately claim, that the sentencing court would have been constitutionally required to consider alternatives to incarceration had it then sentenced him to imprisonment.

These principles demonstrate the incongruity of respondent's present theory and the holding of the court's below. This Court has expressly held that the full panoply of rights afforded the accused in a criminal prosecution do not apply to probation or parole revocation proceedings. *Morrissey v. Brewer,* 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Thus, the elaborate and formal fact-finding procedures of a criminal trial are replaced with "an informal hearing structured to assure that the finding of a parole [or probation] violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's [or probationer's] behavior." *Morrissey v. Brewer, supra,* 408 U.S. at 484. Further, in many cases not all of the criminal penalties in the arsenal of the sentencing judge are available at the time of the revocation of probation or parole; some jurisdictions limit sentencing discretion after a probation revocation,[9] and other statutes restrict such alternatives as extended probation terms.[10] This is even more true of parole revocation, in which the only remedy is generally to remand the parolee to serve all or part of the balance of his prison

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9. E.g., *Mempa v. Rhay, supra,* 389 U.S. at 135. Contrary to respondent's assertion (Resp.Br. 3, n. 2), it has never been decisionally determined in Missouri whether, in a probation revocation following a suspended execution of sentence, the sentence originally imposed could be reduced. It is absurd for respondent to imply, by his citation of *State ex rel. Wagner v. Ruddy,* 582 S.W.2d 692 (Mo. banc 1979), that the sentencing judge somehow loses jurisdiction upon the imposition of probation; by that rationale, no revocation hearing could be held. See *State v. Bachman,* 675 S.W.2d 41, 46 (Mo.App. 1984).

10. E.g., W.Va.Code § 62-12-11 (1984); Ariz.Rev.Stat.Ann. § 13-902.

term.[11] That being the case, it is unsupportable for respondent to argue that federal constitutional scrutiny of probation or parole revocation as it relates to considering "alternatives to incarceration" is actually *greater* than that at the original sentencing.

The analogy between trial and revocation proceedings, and the principle that the constitutional protections adhering to the latter are no greater than those of the former, find support in decisional law. Just as a criminal trial or guilty plea consists of two different determinations, guilt and sentencing, so this Court has observed that probation and parole revocation involves a two-step analysis: whether a violation was committed and, if so, what punitive action should be taken. *Morrissey v. Brewer, supra*, 408 U.S. at 479-480. In both situations, the focus of the procedural protection is the validity and accuracy of the fact-finding process in the first stage; a convicted defendant may mount a constitutional attack upon the sufficiency of the evidence of his guilt, *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and so may a revoked probationer or parolee. *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973). Similarly, the accused in either proceeding could complain if he were not afforded all of the procedural rights that were due him. See *Kartman v. Parratt*, 535 F.2d 450 (8th Cir. 1976). As with a convicted defendant, a revoked probationer or parolee cannot be subjected to a sentence which unnecessarily punishes him because of indigency. *Bearden v. Georgia*, 461 U.S 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). However, *no* authority cited by respondent or known to petitioners suggests that, as a matter of federal constitutional

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11. E.g., Fla.Stat.Ann. § 947.21 (West, 1983 Supp.); Ga. CodeAnn. § 42-9-44 (1983).

law, the federal courts may look over the shoulder of the revoking authority to determine what factors were considered in deciding the proper response to the probation or parole violation, and overturn this decision on sentence if alternatives to incarceration were not contemplated.[12] As the above principles demonstrate, such a holding is manifestly inconsistent with settled constitutional principles, as well as repugnant to the interests of federalism.

B. Respondent's Argument and the Holding Below Are Unsupported by Any Decision of This Court

The decisional justification offered by respondent, and by the Eighth Circuit, in support of the decision below focuses upon three statements or holdings in the opinions of this Court: (1) the assertion in *Morrissey* (408 U.S. at 479-480) that revocation is a two-step process, the second step of which is whether the parolee "should . . . be re-

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12. This argument gives rise to an interesting anomaly which respondent has made no attempt to explain. Many states, including Missouri, permit the court to suspend a criminal proceeding after the conviction or guilty plea and place the defendant on probation, with the stipulation that no sentence will ever be imposed unless the probation is revoked. § 549.071, RSMo, quoted in respondent's Appendix. A "suspended imposition of sentence" is not a final judgment and, if probation is successfully completed, it is not a "conviction" under Missouri law. *State ex rel. Peach v. Tillman*, 615 S.W.2d 514, 517 (Mo. App. 1981). This Court has held that such a deferred sentencing is governed by the same constitutional rules as a sentence immediately after conviction, in that the defendant has an *absolute* right to counsel. *Mempa v. Rhay, supra*, 389 U.S. at 134-137; cf. *Gagnon v. Scarpelli, supra*. If respondent's argument is that a decision on sentence following revocation is always to be judged by a different (and higher) constitutional test than that following a plea or finding of guilt, how can he harmonize the holding in *Mempa*? If respondent asserts that a suspended imposition of sentence is an exception to his proposed rule, how can he justify this distinction in due process terms?

committed to prison or should other steps be taken to protect society and improve chances of rehabilitation"; (2) the holding in *Morrissey* (408 U.S. at 489) that the parole revocation should contain "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole"; and (3) the ruling in *Bearden* (461 U.S. at 672) that an indigent probationer cannot be incarcerated by reason of his good-faith inability to pay a fine or restitution unless alternatives to incarceration are considered (Resp.Br. 14-17, 22-24; *Romano v. Black, supra,* 735 F.2d at 321-322).

The respondent's reliance upon the "two-step" language in *Morrissey* seems to reflect an inability to distinguish between language in the opinions of this Court which analyze the factual context underlying the issue with which it is faced, and language which promulgates an actual constitutional rule.[13] The above-quoted language is perfectly true; after a probation or parole violation is found, the revoking authority does generally consider whether incarceration or some other method of dealing with the violator is the proper remedy. However, *exactly the same* is true of a judge who makes the sentencing decision after a conviction or guilty plea—it is for him to

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13. Respondent's blurring of this distinction is keenly illustrated by his statement that this Court held as a matter of due process in *Morrissey* that "[p]robation should be revoked only when the trial court is convinced that the probation violator's conduct is so serious that he or she 'cannot be counted on to avoid antisocial activity.' *Morrissey*, 408 U.S. at 479" (Resp.Br. 15). The actual statement in *Morrissey* is as follows:

> *Typically*, a parolee will be counseled to abide by the conditions of parole, and the parole officer *ordinarily* does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity" (emphasis supplied). *Id.*

decide whether prison, a fine, probation, community service, or some other creative alternative is proper—yet this fact has not been (and should not be) metamorphosed into a federal constitutional right to the consideration of alternatives to incarceration at the time of sentencing. Even casual or incidental statements by this Court are taken seriously by the lower state and federal courts. See *Hendricks County Rural Electric Membership Corp. v. N.L.R.B.*, 627 F.2d 766, 768 (n. 1) (7th Cir. 1980), *reversed*, 454 U.S. 170, 102 S.Ct. 216, 70 L.Ed.2d 323 (1981). Here, petitioners submit, this reliance is misplaced and cannot sustain the constitutional doctrine propounded by the courts below.[14]

Nor can a constitutional requirement to consider alternatives to incarceration be generated from the mere requirement of a written statement as to the evidence and reasons for revocation. *Morrissey v. Brewer, supra*, 408 U.S. at 484. Even assuming that this requirement is intended to apply to a probation revocation hearing on the record before the sentencing judge (*but see* Pet.Br. 21), nothing in it suggests or implies that the revoking authority is required to consider alternatives to incarceration in arriving at its "reasons." The sufficiency of a written statement can only be evaluated according to the policies which support the requirement of such a statement: "to allow the reviewing court to determine whether

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14. Respondent also cites this "two-step" language, quoted in the petitioners' brief before the Eighth Circuit, as constituting an admission by petitioners in the Court of Appeals that alternatives to incarceration had to be considered (Resp.Br. 18, n. 17). For the reasons stated above, this assertion is frivolous. Petitioners' position is the same in this Court as below: that a state court revoking probation or parole was not required to affirmatively consider alternatives to incarceration. Never have petitioners implied, let alone admitted, that such consideration is a matter of constitutional right.

there was a factual basis for revocation and to provide a probationer with a record of the proceedings so as to protect him from a second revocation proceeding based on the same conduct." *Kartman v. Parratt, supra* at 457-458. In the present case, the sole issue in the revocation hearing was whether respondent was guilty of the felony of leaving the scene of an accident. The state court unambiguously found that respondent was guilty (J.A. 107-110), and this was the only "reason" for revocation. "It would be strange indeed if the formal requirements of fact finding and determination of guilt were to be more strict at a probation revocation hearing than at an original criminal trial." *State v. Jaworski*, 194 Neb. 645, 234 N.W. 2d 221, 223 (1975).[15]

Entirely independent of his claim that alternatives to incarceration should have been considered, respondent advances the proposition that this Court can review the revocation of his probation as a matter of "abuse of discretion," citing *Burns v. United States*, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932). *Burns* dealt specifically with a revocation under *federal law*, and contains no constitutional holding whatsoever. *Id.*, 287 U.S. at 220-223. Respondent offers no pertinent authority, and petitioners find none, holding that federal courts may review state probation or parole revocation for an "abuse of discretion."

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15. Respondent's discussion of *Bearden v. Georgia, supra* (Resp.Br. 22-24) is adequately addressed in petitioners' original brief (Pet.Br. 15, 23-24), and in the brief of the *amicus curiae*, and will not be repeated here.

C. Respondent's Proposed Construction of the Constitution to Require Consideration of Alternatives to Incarceration Is Contrary to Serious Policy Considerations, and May Well Act to the Prejudice of Potential Probationers

In seeking to justify the new "constitutional" doctrine promulgated by the courts below, respondent bewails the danger of "unbridled discretion" in probation or parole revocation (Resp.Br. 26); at the same time, he admits that this doctrine would *not* be any real check upon the discretion of the revoking authority (Resp.Br. 30-31). By respondent's own account, it seems, the requirement that alternatives to incarceration be affirmatively considered would serve only one significant purpose: to afford state prison inmates whose probation or parole has been revoked an even greater scope to file a flood of technical challenges in federal court to their revocation proceedings. The proposed "constitutional standard" drafted by respondent (Resp.Br. 32-33) is a litigator's playground; what is sufficient to constitute a "reasoned explanation," when would respondent's stated exception to the requirement apply, and what if some reviewing federal court conjured up an "alternative" that the state court failed to consider? Respondent's unbridled eagerness to convert the federal courts into another state appellate forum in revocation proceedings is evident from his brief: he seeks to relitigate not only his probation revocation but his guilty plea, he ignores the credibility determinations of the state hearing court, and he asks this Court to reexamine the decision to revoke probation as an "abuse of discretion." However, the proposed expansion of constitutional supervision over state probation and parole revocation would be anything but beneficial to an overtaxed federal judicial system, it would be even less so to the state courts for

the reasons aptly stated in *Engle v. Isaac*, 456 U.S. 107, 126-128, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), and by respondent's own admission it would not prevent an arbitrary or oppressive revocation if the revoking authority had it in its mind to do so.

In one respect, and one only, respondent is correct: probation and parole are desirable alternatives in appropriate cases (Resp.Br. 25).[16] For that reason as well, respondent's effort to apply a *higher* standard of due process to sentencing decisions after revocation than to such decisions after the original plea or finding of guilt (see Part IIA of this brief, *supra*) could not be anything other than harmful to the interests of persons who might be eligible for probation or parole. Under the doctrine established by the courts below, a decision to place a convicted defendant on probation would create the risk that, if that individual's probation were later revoked and the "right" words were not used in ordering revocation, the court's sentencing decision could be relitigated by federal habeas corpus and might be overturned years later and a new revocation hearing ordered—or, as in this case, the probationer might be simply discharged with no further recourse by the state. On the other hand, a decision by the judge to send the defendant to prison at the time of original sentencing would be unreviewable, so long as the sentence was not inherently unconstitutional. Trial judges would be other than human if such a situation did not influence to some degree, even unconsciously, their decisions on sentencing. Given the allegation by respondent and the District Court that the state

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16. On the other hand, respondent's theory that the right to due process in probation or parole revocation fluctuates according to the probation and parole statistics (Resp.Br. 15, n. 12; 27-29) is unsupportable under *Morrissey*, *Gagnon* or any other pertinent decision of this Court.

Circuit Court in the present case "harbored a disposition to send Romano to jail" (Resp.Br. 6; *Romano v. Black, supra*, 567 F.Supp. at 886)—unsupported by a scintilla of evidence though this allegation may be—one wonders why they would desire the constitutional construction they espouse.

D. No Reasonable Constitutional Construction Supports the District Court's Denial of Petioners' Request for an Evidentiary Hearing or Its Discharge of Respondent From Custody

These issues are adequately addressed in petitioners' original brief (Pet.Br. 28-40) and petitioners stand upon that discussion.

CONCLUSION

For the reasons stated in this brief and petitioners' original brief, the decision of the Eighth Circuit should be reversed and respondent returned to his status as a parolee in the custody of the Missouri Division of Probation and Parole.

Respectfully submitted,

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